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ABSTRACT

The purpose of this publication is to make available to the public official rulings relating to the Federal old-age, survivors, disability, health insurance, supplemental security income, and miners' benefit programs. The rulings contain precedential case decisions, statements of policy and interpretations of the law and regulations. Included is a cumulative listing of selected court case decisions published as rulings (1971-1976). (Author)

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for S.L.

SOCIAL SECURITY
RULINGS

On Federal Old-Age, Survivors, Disability, Health Insurance, Supplemental Security Income, and Black Lung Benefits

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
USA

CUMULATIVE BULLETIN 1976

SSR 76–1c TO SSR 76–43

Social Security Administration
Office of Program Policy and Planning
OPR Pub. No. 002 (4-77)

PREFACE

The Cumulative Bulletin of Social Security Rulings is published annually under the authority of the Commissioner of Social Security for the purpose of making available to the public, official rulings relating to the Federal old-age, survivors, disability, health insurance, supplemental security income, and miner's benefit programs.

It is the policy of the Social Security Administration to publish rulings of general interest in order to promote understanding of the provisions and administration of titles II, XVI, and XVIII of the Social Security Act, title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, and related laws. In publishing these rulings, care has been taken to avoid the disclosure of confidential information, and of the identity of the parties or other persons involved, unless already a matter of public record, as in court cases.

The rulings contain precedential case decisions, statements of policy and interpretations of the law and regulations. A ruling would not be applicable to other cases where the facts are not substantially the same as those stated in the ruling. In applying these rulings, the effect of subsequent legislation, regulations, court decisions, and rulings must also be considered. The rulings as published may be modified or superseded by subsequent rulings.

Citation of Social Security Ruling may be made by reference to the ruling number and the Cumulative Bulletin and page where reported. For example, Social Security Ruling No. 19 for 1976 should be cited as "SSR 76–19 C.B. 1976 p. 5."

This Cumulative Bulletin reproduces in full Part I of all quarterly issues of the "Social Security Rulings" published in 1976. It contains precedential case decisions relating to the provisions of titles II and XVIII of the Act, title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, and policies and interpretations which may affect the rights of claimants under these titles. Cases decided in the Federal courts upon appeal from the decision of the Secretary are identified by a suffix "c" after the ruling number. Case decided by the Appeals Council of the Bureau of Hearings and Appeals, representing the final decision of the Secretary, are identified by a suffix "a" after the ruling number.

All references herein to sections of law relate to sections of the Social Security Act, as amended, unless otherwise specifically designated.

All references herein to regulations, unless otherwise specified, relate to those regulations of the Social Security Administration which are published in the Code of Federal Regulations under Title 20—Chapter III—Part 404 (Federal Old-Age, Survivors, and Disability Insurance), Part 405 (Federal Health Insurance for the Aged), and Part 410 (Federal Black Lung Benefits), and Part 416 (Supplemental Security Income). For example, 20 CFR 404.312 refers to section 404.312, Part 404, Chapter III of Title 20 of the Code. New and amended regulations are printed initially in the Federal Register.

"Social Security Rulings" was published quarterly from 1960 through October 1967, bimonthly from the January 1968 through November 1974 issues, publication again became quarterly beginning January 1975. The subscription price is $11.45 a year ($2.68 additional for foreign mailing). The price per copy is $2.90.

Cumulative Bulletins containing the rulings issued during 1974 and 1975 are available by individual purchase from Superintendent of Documents, Government Printing Office. The prices are:

Cumulative Bulletin 1974	$1.55
Cumulative Bulletin 1975	1.90

Cumulative Bulletins from 1960 on other than those listed above, may be obtained free of charge upon request to the Social Security Administration, Office of Policy and Regulations, 6401 Security Blvd., Baltimore, Maryland 21235.

The Social Security Act and related laws are printed in the "Compilation of the Social Security Laws." The 1973 edition is available for purchase in two volumes. Volume I contains the Social Security Act as amended through January 1, 1973, title IV of the Federal Coal Mine Health and Safety Act, as amended in May 1972, and pertinent provisions of the Internal Revenue Code of 1954. Volume II contains sections of amending acts affecting the Social Security Act, provisions of the Act which have been repealed and provisions of related enactments through December 31, 1972. These volumes may be purchased together or separately, at $3.45 for Volume I and $3.20 for Volume II. The Social Security Act is also contained in title 42 of the United States Code, section 301 et seq; title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended (miner's black lung benefits) is contained in title 30 of the United States Code, sections 901 et seq.

Title 20 of the Code of Federal Regulations, revised as of April 1, 1975, consists of two volumes which can be purchased together or separately. Volume I sells for $2.45, Volume II, containing Chapter III, sells for $9.70. New and amended regulations are printed initially in the Federal Register. The charge for individual copies is 75 cents for each issue, or 75 cents for each group of pages as actually bound.

The Social Security Handbook, fifth edition, reflects the provisions of the Social Security Act as amended through December 31, 1973, the regulations issued thereunder, and precedential case decisions (rulings), relating to the retirement, survivors, disability, health insurance, black lung benefits, and supplementary security income programs. It also includes brief descriptions of related programs. The Handbook is intended for the use of people who want a detailed explanation of these programs, how they operate, who is entitled to benefits and how such benefits may be obtained. The Handbook may be obtained for $4.30.

These publications, including materials now being prepared or planned, when published, may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402. A check or money order covering the cost of the publication, when listed, should accompany the order for the publication.

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Child's Insurance Benefits

SECTION 202(d)(7) (42 U.S.C. 402(d)(7))—CHILD'S INSURANCE BENEFITS—STUDENT—PERIOD OF NONATTENDANCE

20 CFR 404.320 SSR 76–19

> **Where due to a strike by the personnel of an educational institution, a student beneficiary is unable to resume or continue full-time attendance at the institution for a period of time exceeding four consecutive calendar months, the period of time during which the beneficiary is unable to attend classes because of the strike need not be considered a "period of nonattendance" as that term is used in subparagraph (B) of section 202(d)(7) of the Social Security Act. For purposes of continuing entitlement in such situations, the inquiry is whether, pursuant to subparagraph (A) of section 202(d)(7) the beneficiary would be considered by the institution to be a "full-time student" during the strike or whether, but for the strike, the beneficiary would have been "in full-time attendance" at the institution, and whether, upon settlement of the strike and the resumption of classes, the beneficiary either intends to, or in fact does, continue to attend the institution as a full-time student.**

A strike of personnel of an educational institution prevented the holding of regularly scheduled classes, and a student beneficiary, because of this strike, was unable to attend classes for a period of time which exceeded four months. With respect to those students who were entitled to student benefits prior to the strike, it is held that the period of time during which the student beneficiary is unable to attend classes because of a strike need not be considered a "period of nonattendance" as that term is used in subparagraph (B) of section 202(d)(7) of the Social Security Act. In such situations the applicable provision of the statute is subparagraph (A), rather than subparagraph (B), of section 202(d)(7).

Subparagraph (B) reads as follows:

> "(B) Except to the extent provided in such regulations, an individual shall be deemed to be a full-time student during any period of nonattendance at an educational institution at which he has been in full-time attendance if (i) such period is 4 calendar months or less, and (ii) he shows to the satisfaction of the Secretary that he intends to continue to be in full-time attendance at an educational institution immediately following such period. An individual who does not meet the requirements of clause (ii) with respect to such period of nonattendance shall be deemed to have met such requirement (as of the beginning of such period) if he is in full-time attendance at an educational institution immediately following such period."

This provision applies where a student beneficiary has a "period of nonattendance" which is four consecutive months or less and following which he or she resumes full-time attendance. Subparagraph (B) provides that in such situations, the student beneficiary may be deemed to have been a full-time student during the period in which he or she was not attending the institution. The legislative history of this provision indicates that its intent was to provide for the continuation of benefit payments during normal school vacation periods as well as during the school year and to provide for benefits for any period of four calendar months or less in which a person does not attend school.[1] A "period of nonattendance" could properly be considered to be the period of time during which the student beneficiary (who was enrolled as and who had, by the standards of the institution, the status of a full-time student) personally decided or was compelled not to be active as a full-time student due to personal circumstance or because of personal conduct. Such personal circumstances could include events such as employment or illness, or could arise because the institution is not then offering courses which are of interest to the beneficiary.

Section 404.320(c)(3) of Regulations No. 4 has defined the status of "deemed full-time student during a period of nonattendance," to exclude an individual whose nonattendance is due to expulsion or suspension, notwithstanding the fact that the individual intends to or does in fact resume full-time attendance within four calendar months after the beginning of such period of nonattendance. Under both subparagraph (B), quoted above, and section 404.320(c)(3), a "period of nonattendance" may not exceed 4 consecutive calendar months. However, where a student beneficiary is prevented because of a strike of school personnel from resuming or continuing full-time attendance, the applicable provision of the statute is subparagraph (A) of section 202(d)(7). Subparagraph (A) reads as follows:

"(7) For purposes of this subsection—

> "(A) A 'full-time student' is an individual who is in full-time attendance as a student at an educational institution, as determined by the Secretary (in accordance with regulations prescribed by him) in the light of the standards and practices of the institutions involved, except that no individual shall be considered a 'full-time student' if he is paid by his employer while attending an educational institution at the request, or pursuant to a requirement of his employer."

This provision defines a full-time student as a student who is "in full-time attendance." Full-time attendance is to be determined in light of the standards and practices of the institutions involved and in accordance with regulations prescribed by the Secretary. The applicable regulation, section 404.320(c)(2) of Regulations No. 4, defines full-time attendance to provide, generally, that if an individual is enrolled at an educational institution and is carrying a subject load which is considered full-time by the institution, he or she may be considered a full-time student. Thus, if there are no classes being conducted by an educational institution because of a strike, but the institution intends to resume classes when the strike is over, the inquiry should be whether the beneficiary would be considered by the institution to be registered or enrolled as a full-time student during the strike or whether, but for the strike, the beneficiary would have been in full-time attendance at the institution and whether, upon settlement of the labor dispute and the resumption of classes, the beneficiary either intends to, or actually does, continue to attend the institution as a full-time student.

---

[1] See, H.R. Rep. No. 213, 89th Cong., 1st Sess. 86 (1965) and S. Rep. No. 404, 89th Cong., Sess. 97 (1965).

SECTION 202(d) (42 U.S.C. 402(d))—CHILD'S INSURANCE BENEFITS—DEFINITION OF EDUCATIONAL INSTITUTION.

20 CFR 404.320(c)(5) SSR 76–11a

> Where claimants for child's insurance benefits as "full-time students" contended that because the credits of the nonaccredited school they attended were accepted, on transfer, by three schools recognized by the Social Security Administration as educational institutions, benefits should be awarded, *Held*, although three schools accepting credits from the claimants' school are recognized by the Administration as educational institutions, they have not been *accredited* by a State-recognized or nationally-recognized accrediting agency and therefore the school attended by the claimants does not meet the definition of an "educational institution" set forth in Section 202(d)(7)(C) of the Social Security Act.

The issue before the Appeals Council is whether the claimants are entitled to child's insurance benefits as full-time students. Specifically at issue is whether the school they attend meets the definition of an educational institution as prescribed by section 202 (d)(7)(C) of the Social Security Act and section 404.320(c)(5) of Regulations No. 4.

The wage earner was entitled to old-age insurance benefits beginning January 1973. On October 2, 1972, he filed an application for child's insurance benefits on behalf of his two sons. This claim was denied initially and upon reconsideration because it was determined that the school the children were attending was not a school approved by a State or accredited by a State-recognized or nationally-recognized accrediting body. The administrative law judge concluded that, since three schools that were recognized as educational institutions by the Social Security Administration accepted transfer credits from the school attended by the claimants, it met the definition of an educational institution and that the claimants were, therefore, entitled to child's insurance benefits. Although the school in question is not accredited by any recognized accrediting agency, it will be recognized as an educational institution for purposes of entitlement to child's insurance benefits if three *accredited* educational institutions accept its credits—on transfer.

Section 202(d)(7)(C) of the Social Security Act defines an "educational institution" as follows:

> "(C) An 'educational institution' is (i) a school or college or university operated or directly supported by the United States, or by any State or local government or political subdivision thereof, or (ii) a school or college or uni-

> versity which has been approved by a State or accredited by a State-recognized or nationally-recognized accrediting agency or body or (iii) a nonaccredited school or college or university whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited" See, also, Social Security Administration Regulations No. 4, section 404.320(c) (5).

The Social Security Administration sent the customary school attendance form to the school attended by the claimants, and the school informed the Administration of three schools in the United States to which they had sent academic records. These three schools are not accredited educational institutions and the acceptance by these schools of transfer credits from the school attended by the claimants is insufficient to qualify it as an educational institution within the meaning of section 202(d)(7)(C) of the Act.

The claimant presented letters from three schools which all indicate that they freely accept all transfer credits taken at the school which the claimants attend. All three of these schools are recognized as educational institutions by the Administration and precedent cases are available which indicate that students at these schools are receiving child's insurance benefits as full-time students. Because these three educational institutions accept on, transfer, the courses taken at the school attended by the claimants, the administrative law judge found that it met the definition of an educational institution.

However, none of these three schools are accredited schools. Since the Social Security Act and the applicable regulations require that the credits be accepted, on transfer, by three institutions "which have been accredited by a State-recognized or nationally recognized accrediting agency," the acceptance of transfer credits by these three schools does not qualify the school in question.

This being the case, the school does not meet the prescribed definition of an educational institution and the claimants are not entitled to benefits.

SECTION 202(d) (42 U.S.C. 402(d))—CHILD'S INSURANCE BENEFITS—FELONIOUS HOMICIDE—EFFECT OF JURISDICTION BY JUVENILE COURT—MAINE

20 CFR 404.364 SSR 76-29

> In the State of Maine, where the 15 year old son of the wage earner, accused of murdering his father, is dealt with totally within the framework of the juvenile court, *HELD,* he has not been finally convicted of intentionally and feloniously killing his father and is, therefore, eligible for benefits.

The issue posed is whether a homicide committed by a juvenile is considered by the State of Maine to be "felonious." The facts appear to be that the wage earner was found shot to death and later the same day his 15-year-old son was arrested and charged with the murder. An attorney was appointed for the boy. One week later, a hearing was held before a judge of the District Court, sitting as a juvenile court, pursuant to 15 M.R.S. Section 2551. At that time, the case was disposed of with the son not being bound over to the grand jury, as was possible under Maine law, the clear inference being that the juvenile court made its own adjudication of the youth's act. On the following day the wage earner's widow applied on behalf of the surviving children for benefits.

The effect of the conviction for feloniously and intentionally killing a wage earner is expressly stated:

> "A person who has been finally convicted by a court of competent jurisdiction of the felonious and intentional homicide of an insured individual shall not be entitled to monthly benefits or to the lump-sum death payments based on the earnings of such deceased individual and such felon shall be considered non-existent in determining the entitlement of other persons to monthly benefits or the lump-sum death payment based on the deceased individual's earnings." 20 C.F.R. 404.364.

Thus, if the son could be said to have been convicted of intentionally and feloniously murdering his father, he would not be entitled to any benefits or be considered in any determination of the amount of benefits to which his mother and/or siblings are entitled. The mere fact that he killed the wage earner is not enough by itself to disqualify the child from receiving benefits; he must have been finally convicted for intentional and felonious homicide in order to be deemed ineligible to receive benefits. In those jurisdictions in which courts are empowered to treat juvenile murderers in a manner different from adults guilty of the same crime, adjudications by those courts are often deemed not to be criminal convictions. Where the juvenile court adjudication is viewed in such a manner, the child accused of parricide remains eligible for benefits.

Maine is one such State that allows a District Court judge sitting in a juvenile court session pursuant to 15 M.R.S. Section 2551, the option in certain instances, of treating a child that comes before the court as either a juvenile offender or binding that child over for a grand jury hearing and subsequent criminal proceeding. Where the latter course is decided upon, the judge must make a finding of probable cause and also find that the child is a dangerous person and a menace to the safety of the community. Only upon such findings may the judge then order the child to be bound over for the grand jury, thereby subjecting the child to standard criminal proceedings. 15 M.R.S. Section 2611, subs. 3.

If, however, the District Court judge employs the first option mentioned, that of dealing with the problem totally within the juvenile court framework, then the effect on status of the child accused of a crime quite naturally is altered. The judge would then make an adjudication of the commission of a juvenile offense, the effect of which will ". . . not operate in any manner, or to effect, a disqualification for public office, nor shall it be deemed to constitute a conviction of crime." 15 M.R.S. Section 2052 subs. 1.

Newspaper reports strongly suggest that the judge chose to treat the boy as a juvenile offender. According to the local newspaper, the judge, while extremely reluctant to discuss the case, did acknowledge that the boy was *not* bound over to the grand jury, that his case had remained within the framework of the juvenile court system. As such, 15 M.R.S. Section 2502 subs. 1, would then operate to bar any attempt to view whatever decision was reached by the District Court as a conviction for a felonious and intentional homicide. An award of benefits to wage earner's namesake would then be proper and in accordance with the regulations.

SECTIONS 202(d) and 204(b) (42 U.S.C. 402(d) and 404(b))—CHILD'S INSURANCE BENEFITS—OVERPAYMENTS—CHILD OVER AGE 18 NO LONGER STUDENT

20 CFR 404.506 and 404.507 SSR 76-20c

MUNCE v. MATHEWS, 1A Unempl. Ins. Rep. #14,611 (S.D. Ohio 1976)

The child's insurance beneficiary born in January 1953 was graduated from high school in June 1972 and did not continue in school after that date. Knowing that entitlement to child's insurance benefits terminates when a beneficiary over age 18 is no longer a full-time student, the plaintiff continued to accept monthly benefit payments in the belief that notification of these events was unnecessary and that payments would terminate automatically. *Held*, in continuing to accept such payments with the knowledge that entitlement had ceased, plaintiff was not without fault in causing the overpayment of benefits and recovery of the overpayment may not be waived pursuant to section 204(b) of the Social Security Act.

DUNCAN, DISTRICT JUDGE:

This is an action under the Social Security Act, 42 U.S.C. Section 405(g), for review of a final decision of the Secretary of Health, Education and Welfare refusing to waive repayment of an overpayment of social security benefits. This matter is before the Court on plaintiff's motion for summary judgment.

Since 1959, plaintiff and her children have been receiving survivor benefits under the Social Security Act. A child is entitled to benefits until he reaches the age of 18. If a child continues in regular school attendance, he is entitled to benefits from age 18 to age 22. Plaintiff's daughter, Alice M. Estep, was born January 1, 1953. In June, 1972, she graduated from high school. She did not thereafter attend school; thus, she became ineligible for further benefits in June, 1972. Neither plaintiff nor her daughter notified the Social Security Administration of the daughter's ineligibility. An overpayment of $1,255.70 resulted.

The administrative law judge made the following findings of fact which are fully supported by the record before the Secretary:

> During the oral hearing, at which the appellant, Ruth K. Munce, and her attorney, James W. Brown, appeared and participated on October 18, 1974, Mrs. Munce testified that she actually telephoned the Social Security District Office and informed them that Alice was no longer in regular school attendance. She stated that she was told by an individual to whom she talked on the telephone at the district office not to bother them with this information because they automatically adjust payments to children when they attain age 18, or when they stop going to school after age 18. She could not explain how anyone could expect the Social Security Administration to know that a child had discontinued school attendance, unless notification was given. In a questionnaire dated August 3, 1973, the appellant stated "I thought the Social Security Office made the adjustments themselves when a child reached 18 or finished school, as they did with the other children." Thus, the appellant's statements on August 3, 1973 and during the course of the hearing are to the effect that she believed that she was not required to notify the Social Security Administration that Alice was no longer in school attendance after June 1972.
>
> The fact remains, however, that Mrs. Munce did send a notice in March of 1971 with respect to the school year ending June 1971. On that notice, she indicated that Alice was still in full time school attendance; that Alice intended to continue full time school attendance; and that she intended to

> continued in full time school attendance through the next school year ending June 1972. The next notice sent by Mrs. Munce to the Administration contains no dates and was received by the Administration in April 1973. It shows that Alice is not attending school and that she does not intend to attend school. Upon further inquiry, it developed that June 1972 was the last month in which Alice attended school, and that, thereafter, she obtained a job.
>
> On the basis of a refund questionnaire completed by Mrs. Munce, it is apparent that recovery of the overpayment of $1,255.70 would result in some financial hardship. However, I cannot, under the circumstances of this case, find that the appellant was without fault in causing the overpayment. On the contrary, I specifically find that the appellant knew of her obligation to notify the Administration that Alice discontinued regular school attendance after June 1972. I assign no credibility to her assertion that she was informed by employees of the District Office not to bother them with such information because they automatically took the proper action in such cases. The fact that she actually did send notices with respect to Alice's school attendance in March 1971 and in April 1973 clearly indicates that she knew of her obligation to report this event, and that she actually did report the events, but not in time to avoid the overpayment. Consequently, I am persuaded, and I so find, that the appellant was not without fault in this matter.
>
> By reason of the foregoing, it is my decision that adjustment or recovery of the overpayment in this case may not be waived.

Under the provisions of 20 C.F.R. §404.506 the Secretary will waive recovery of an overpayment if the recipient was "without fault" and the recovery would either "(1) Defeat the purpose of Title II of the Act of (2) Be against equity in good conscience." Fault is defined in 20 C.F.R. §404.507:

> "Fault" as used in "without fault" . . . applies only to the individual. Although the Administration may have been at fault in making the overpayment, that fact does not relieve the overpaid individual or any other individual from whom the Administration seeks to recover the overpayment from liability for repayment if such individual is not without fault. In determining whether an individual is at fault, the Administration will consider all pertinent circumstances, including his age, intelligence, education, and physical and mental condition. What constitutes fault . . . on the part of the overpaid individual . . . depends upon whether the facts show that the incorrect payment to the individual . . . resulted from:
>
> (a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or
> (b) failure to furnish information which he knew or should have known to be material; or
> (c) with respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect.

The administrative law judge's determination that plaintiff was not without fault is supported by substantial evidence. Plaintiff's theory is that she thought the Social Security Administration would make the adjustments to the social security payments when the child reached age 18 or finished school. She further states that she was so informed by a local social security administration office. Assuming these facts to be true, plaintiff knew that her daughter's benefits should have been terminated in June, 1972 when she quit school. She was merely under the belief that the Social Security Administration would automatically terminate the payments. When the administration did not, plaintiff then, of necessity, knew that she had received an overpayment of social security benefits. Plaintiff, therefore, accepted, the payment on behalf of her daughter knowing it to have been incorrect.

WHEREUPON, the Court HOLDS that plaintiff's motion for summary judgment is without merit, and therefore it is DENIED. The decision of the Secretary of Health, Education and Welfare is AFFIRMED.

Survivor's Insurance Benefits

SECTIONS 202(d) and (g) and 205(a) (42 U.S.C. 402(d) and (g) and 405(a))—SURVIVOR'S INSURANCE BENEFITS—EVIDENCE OF DEATH—ESTABLISHING DATE OF DEATH AFTER ABSENCE OF SEVEN YEARS

20 CFR 404.705 SSR 76-1c
Sullivan v. *Weinberger*, USDC W.D. OF N.C., C-C-74-167 (4/4/75)
1A Unempl. Ins. Rep. ¶ 14,233 (1975)

> The wage earner ran from his home during flood conditions on February 25, 1961, when police arrived after he had shot one of his 12 children in the shoulder. He was not seen or heard from again, and a State court determined that he died of drowning on February 25, 1961.
>
> *Held:* State court ruling as to date of death is not controlling in considering application for survivor's insurance benefits, and sufficient testimony and evidence exists to support conclusion that the wage earner did not die on February 25, 1961, and to support a presumption of death seven years after his disappearance under SSA Regulations No. 4, section 404.705.

McMillan, District Judge:

Claimant Lola B. Sullivan filed suit on August 12, 1974, for herself individually, and on behalf of her four minor children as guardian ad litem. The suit seeks children's benefits under Section 202(d)(1) of the Social Security Act and mother's benefits under Section 202(g)(1). The issue is the date of death of the wage-earner, Grady Sullivan, husband of the claimant. The hearing examiner ruled that the date of death should be presumed to be seven years after the date of Sullivan's disappearance. Claimants maintain that February 25, 1961, the date of disappearance, is the proper date of death, and they seek a ruling that they are entitled to benefits as of that date.

The records shows that Grady Sullivan disappeared from his home near Jefferson, South Carolina, on February 25, 1961. On that date he had come home intoxicated and, having become upset with the behavior of one of his twelve children, shot her through the shoulder. The police were summoned and upon their arrival Sullivan ran from the house, never to be seen or heard from again. A great deal of rain had fallen for several days prior to Sullivan's disappearance, and the creek close to his home had risen considerably and flooded some areas. Additionally, there was in the vicinity an old mine hole which was very deep and full of water as a result of the rain.

On February 17, 1972, Judge J.A. Spruill of the Court of Common Pleas for Chesterfield County, South Carolina, ruled that Sullivan had died of drowning on or about February 27, 1960. His order was amended by Judge Robert W. Hayes of the Fourth Judicial Circuit of South Carolina on February 11, 1974, so as to change the date of death to February 25, 1961.

The court is not bound by the state court's determination of the date of death. *Tobin* v. *United States Railroad Retirement Board*, 286 F. 2d 480 (6th Cir. 1961); *Lahr* v. *Richardson*, 328 F. Supp. 966 (N. D. Ill. 1971), *aff'd*, 476 F. 2d 1088 (7th Cir. 1973). The rationale behind this rule was explained by the court in *Nigro* v. *Hobby*, 120 F. Supp. 16, 19 (D. Neb 1954):

> The finding of the probate court does not under the principles of res judicata nor the principles of collateral estoppel prevent the issue of the time of the decedent's death from being considered and determined by the administrator in this action. The Federal Security Administrator was not a party to the Nebraska probate proceedings and the money sought to be recovered in this action was not part of the res over which the probate court exercised jurisdiction. The probate decree is, therefore, not controlling in this case.

Mrs. Sullivan first filed for survivor benefits on April 4, 1963, but her application was denied on that and several other occasions. A hearing examiner determined on April 25, 1974, that Sullivan had not died on February 25, 1961, but that his death should be presumed to have occurred seven years later, on February 25, 1968. The examiner ordered that the claimants were entitled to survivor benefits as of the later date, February 25, 1968. The Appeals Council affirmed this decision on July 11, 1974. Because Mrs. Sullivan now lives in Monroe, North Carolina, in this district, she sued in this court for review of the determination of the examiner.

Although from the transcript of the hearing one could reasonably conclude that Grady Sullivan had in fact died on February 25, 1961, there is enough testimony to the contrary to support the "substantial evidence" standard as interpreted by the Supreme Court in *Richardson v. Perales*, 402 U.S. 389 (1971). See also *Laws* v. *Celebrezze*, 368 F.2d 640 (4th Cir. 1966). Similarly, there is sufficient evidence to support a presumption of death seven years after the disappearance, 20 C.F.R. §404.705. Although claimants are obviously poor people who could certainly use the extra money, the record supports the examiner's findings, and the court should not, with its statutorily limited review, reverse the finding of the hearing examiner as to the date of Sullivan's death.

For these reasons the court grants the defendant's motion for summary judgment.

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Applications

SECTIONS 202(d) and 205(j) (42 U.S.C. 402(d) and 405(j))—APPLICATIONS—FILING FOR ALL BENEFITS

20 CFR 404.603 and 404.613 **SSR 76–2**

> **Where only evidence concerning individual's intent with respect to scope of application is statement "I apply for insurance benefits payable to me," *held*, such statement would not support finding that such individual had manifested intent to apply for benefits on behalf of individual for whom such applicant later served as representative payee.**

A question has been raised as to whether the application for a lump-sum death payment filed by the widower of a deceased wage earner may also serve as an application for child's insurance benefits on behalf of the children of the wage earner. Such application contains the following statement:

> I hereby apply for the lump-sum death payment and for any insurance benefits *payable to me* under Title II of the Social Security Act, as amended. (Emphasis added)

There is no statement on the application form with respect to the identity, or even the existence, of the subject children.

The precise question was as follows:

> The question presented is whether the application by the widower may be treated as an application on behalf of one or more of the children since, under applicable regulations, the widower may have been the proper party to execute an application on behalf of the children and since benefits for the children may have been 'paid' to the widower as their representative payee under section 205(j) of the Social Security Act.

The Social Security Act provides, with exceptions not relevant here, that to be entitled to a benefit, an individual must file an application therefore. Thus, section 202(d)(1) of the Social Security Act, as amended, provides that an individual shall be entitled to a child's insurance benefit if such individual, inter alia, "has filed application for child's insurance benefits." The courts have held that a claimant would not meet this "substantive" requirement for filing an application unless he has, in a manner consistent with the Act and regulations, manifested an intent to claim a social security benefit. *Bender* v. *Celebrezze*, 332 F.2d 113 (7th Cir., 1964); *McNally* v. *Fleming*, 183 F. Supp. 309 (D.N.J., 1960); *Medalia* v. *Folsom*, 135 F. Supp. 19 (D. Mass., 1955). Thus in instances where a written statement (which later is perfected by a subsequently executed prescribed form) may be considered an "application," section 404.613 of Social Security Administration Regulations No. 4 (20 C.F.R. 404.613) provides that such written statement must indicate an intention on the part of the applicant to claim monthly benefits.

The same "filing" requirements must be met where, under section 404.603 of Regulations No. 4, a party other than the claimant files an application for benefits on behalf of the claimant. The party filing the application must identify the individual claiming the benefit and manifest in writing an intent to claim benefits on his behalf.[1]

Whether an individual intended to claim a social security benefit and the scope of his application for a benefit are issues of fact which generally must be resolved by the appropriate trier of fact within the Social Security Administration. However, where the only evidence concerning the individual's intent with respect to the scope of his application is the statement on the application, "I apply for benefits payable to me," such statement would not be sufficient to find that the individual had manifested an intent to apply for benefits on behalf of another individual, even though the applicant could have been "paid" benefits as the representative payee for such other individual had such other individual later become entitled to a benefit.[2]

First, the statement "I apply for benefits payable to me," would not, by itself, indicate that the individual filing the application is acting in a representative capacity. Without any such indication, it is assumed that the individual is acting on his own behalf. Unless SSA finds on the basis of other contemporaneous evidence that the applicant manifested an intent to apply for benefits in a representative capacity, an application with a statement thereon like that involved here may serve only as an application for the individual who filed it.

Further, while benefits may be "paid" in limited circumstances to the representative payee of an entitled individual under section 205(j), such payee does not thereby become entitled to such benefits and such benefits may not be considered to be benefits "payable to him." Under the provisions of section 202(d) of the Act, it is clear that, whether the child files the application himself or the filing is done by another person acting on behalf of the child, the child legally is the person "entitled" to child's insurance benefits and such benefits are "payable" to the child rather than to its parent or to any other person acting on the child's behalf. This is manifest from a reading of section 202(d) and of section 205(j), which concerns representative payment. Section 205(j) provides:

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[1] The only category of benefits where an individual other than the claimant commonly must execute an application on behalf of the claimant is child's insurance benefits. Thus, the legend on the application for child's insurance benefits reads as follows:

> "I hereby apply, on behalf of the child or children listed in item 3 below, for all insurance benefits payable to them under Title II of the Social Security Act, as amended. (*If you are applying on your own behalf, answer the questions on this form with respect to yourself.*)"

Where a proper party has filed *on behalf of* a claimant one of the prescribed application forms other than the form for child's insurance benefits, that party must indicate on the application form that he is filing in a representative capacity. Such process is described in Claims Manual section 2030. Otherwise, there would be no basis for SSA to find that such applicant had filed the application on behalf of another person in addition to, or instead of, himself.

[2] For such entitlement, other requirements would, of course, have to be met: the individual applying would have to be a proper party to apply on behalf of such other individual under section 404.603 of Regulations No. 4, and such other individual would have to meet all other entitlement requirements at a time within the life of the purported application.

> (j) When it appears to the Secretary that the interest of an applicant entitled to a payment would be served thereby, certification of payment may be made, regardless of the legal competency or incompetency of the individual entitled thereto, either for direct payment to such applicant, or for his use and benefit to a relative or some other person.

And, finally, even if the words "I apply for benefits payable to me" could be interpreted to mean that the applicant was filing in a representative capacity for an individual on whose behalf the applicant may have been "paid" benefits as the individual's representative payee, such words would not indicate with any certainty the identity of the purported "claimant." A determination concerning when to institute representative payment and who to select as the representative payee is ultimately within the sound discretion of the Secretary. (Section 205(j) of the Act provides only that the Secretary "may" institute representative payment and implicitly that he "may" select one individual from several potential payees where it appears to him that the interest of an applicant entitled to a payment would be served thereby.) If the only manner in which an undisclosed claimant could be identified for purposes of the "substantive" application requirement would be through the selection of another person as his representative payee, (such selection being within the discretion of the Secretary) and if such "other" individual would not be selected until the claimant had been determined to be entitled, it would follow that an application for benefits by a "potential" payee for an undisclosed claimant would never sufficiently identify the claimant to serve as an application on behalf of the claimant.

Accordingly, on the basis of the foregoing, if the *only* evidence manifesting the applicant's intent is the statement on his application, "I apply for insurance benefits payable to me," such applicant has not filed for benefits on behalf of another individual.

SECTION 202(b)(1)(A) and 202(d)(1)(A) (42 U.S.C. 402(b)(1)(A) and 402(d)(1)(A))—APPLICATIONS—INTENT TO FILE

20 CFR 404.613 **SSR 76-30**

The wage earner specified in written statement that he did not wish to file for benefits on behalf of his dependents because he had "no immediate plans of retirement." Under applicable provisions of Social Security Act, it would not have been in the interest of the dependents to delay filing for benefits solely because of wage earner's retirement plans. *HELD*, the written statement raises sufficient doubt about wage earner's intent with respect to filing for benefits on behalf of his dependents which doubt is to be resolved in favor of finding intent to file that such statement indicated such intention, as required by Regulations No. 4, section 404.613(b).

A question has been raised concerning a written statement which was made by the wage earner on behalf of his wife and child.[1] Such statement reads as follows:

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[1] The statement was included on the wage earner's application for retirement insurance benefits. In addition to the statement, the wage earner makes specific reference on the application to his wife and his son.

"I do not wish to file for [my] wife and child now since I have no immediate plans of retirement."

The specific issue raised was whether the quoted statement would qualify as a written statement which indicates an intention to claim benefits on behalf of another person as required by Regulations No. 4, section 404.613(b).[2]

Sections 202(b)(1)(A) and 202(d)(1)(A) prescribe the application requirements for wife's and child's benefits respectively. In each case the individual must have "filed application for . . . benefits." Section 404.613 of Social Security Administration Regulations No. 4 sets forth the circumstances under which a written statement (rather than a prescribed application form) may be considered to be an application for monthly benefits. Section 404.613 also indicates the circumstances under which a person other than the claimant may file a written statement on behalf of the claimant.[3] In describing the type of written statement necessary, section 404.613(b) prescribes that the statement must "[indicate] *an intention* to claim on behalf of another person monthly benefits." (Emphasis supplied.) While section 404.613 does not make explicit reference to "doubtful intents," it clearly does not preclude SSA from finding an intent to file where a written statement raises doubt about an individual's intent to file. Section 404.613(c)(1) provides, in pertinent part, that once a written statement has been received, notice in writing shall be sent to the claimant (or where the claimant is a minor or incompetent, to the person submitting the written statement on his behalf), stating that an initial determination will be made with respect to such written statement if a prescribed application form is filed with SSA within 6 months from the date of the notice. Thus, if any doubt concerning an individual's intent to claim benefits on behalf of another has been manifested by a written statement, such doubt could be resolved by giving the individual the opportunity to file a prescribed application form within 6 months from the date of SSA's notice. The foregoing interpretation has been explicitly adopted as part of SSA's operating procedures. These procedures provide that if some doubt exists about intent to file, the doubt should be resolved by finding an intent to file.

In light of the foregoing conclusions pertaining to the requisite intent for purposes of the application requirement, the sole issue remaining to be resolved with respect to the subject wage earner's statement is whether it did in fact raise doubt about his intent to file on behalf of his wife and child. The only evidence concerning the wage earner's intent with respect to the purported filing for his wife and child was the statement previously quoted and specific reference to his wife and child (see footnote 1) on the wage earner's application. The written statement indicates that the wage earner's sole reason for not wishing to file for benefits was his concern that his retirement plans would in some way make it disadvantageous for him to file or at least nullify any advantages that may arise from the filing. This simply is not the case, however. It clearly would have been advantageous under applicable provisions of the Social Security Act for him to have filed regardless of his retirement plans.

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[2] It does not appear that an individual could meet the application requirement for monthly benefits by manifesting an intent couched in terms of a future contingency. The regulatory scheme implementing the statutory application requirement does not authorize the Social Security Administration to hold in abeyance a purported application or written statement until the Social Security Administration has been able to verify the occurrence of some future event designated by the individual in such application or statement.

[3] Under the facts raised here, the subject wage earner would be permitted to file a written statement of intent on behalf of his spouse and his son. Section 404.613(b)(2)(i) and (ii) of Social Security Administration Regulations No. 4. Thus, if the Social Security Administration finds that his statement manifested the requisite intent to claim benefits, such statement may serve as application for both spouse and son.

If a wage earner files an application on behalf of his dependents within one year of the month of their initial eligibility for benefits (henceforth referred to as a "timely" filing) his dependents are assured of receiving all benefit payments which are not precluded by the annual earnings test (or by another deduction or nonpayment provision) for the duration of their entitlement. Such assurance is quite important due to the many uncertainties inherent in the application of the annual earnings test[4] and the possibility that the wage earner may not be diligent in applying for benefits once it appears that such test will no longer preclude payments. Further, a timely filing by dependents can sometimes work to the advantage of the family in the application of the annual earnings test. Newly entitled dependents increase the amount of the family's benefits against which work deductions may be imposed. Thus, in some instances, a family with entitled dependents may be able to receive benefits for part of a year even though no benefits would have been payable to the wage earner if solely he were entitled. While it is generally to the advantage of both wage earner and dependents for the dependents to make a timely application, we are aware of no countervailing disadvantages associated with a timely filing under the circumstances present here.

Accordingly, since it would not have been in the interest of the wage earner's dependents to have their filing delayed solely because of the wage earner's retirement plans and since the wage earner indicated in his written statement that the absence of plans to retire was the basis for his purported wish not to file, the written statement may be viewed by SSA as raising doubt about the wage earner's intent to file and that SSA may find that the wage earner did intend to file as required by section 404.613(b).[5]

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[4] "Uncertainties" which affect the imposition of work deductions include changes in the level of the wage earner's annual earnings as well as fluctuations in earnings from month to month during the year, changes in the number of individuals who are entitled on his account, statutory changes affecting the nature of the test itself. Uncertainties such as these make it difficult for individuals to predict whether benefits otherwise payable to them or their dependents would be precluded by the test.

[5] The U.S. Court of Appeals for the Second Circuit held that a written statement which closely paralleled the written statement made here qualified under section 404.613(a) as a filed "written statement . . . that indicates an intention to claim monthly benefits." *Widermann* v. *Richardson*, 451 F.2d 1228 (2d Cir., 1971).

EMPLOYMENT

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Wages

SECTION 209(g)(2) (42 U.S.C. 409(g)(2))—EMPLOYMENT—WAGE EXCLUSION FOR DOMESTIC SERVICE—CONSTITUTIONALITY

20 CFR 404.1027(j) and (1) SSR 76-12c

FISHER, et al v SECY OF HEALTH, EDUCATION, AND WELFARE, et al, USCA, 7th Cir., 522F 2d 493 (1975)

> Where claimant alleged that the minimum earnings requirement, excluding earnings of less than $50 a quarter for domestic service from a single employer, discriminated against certain domestic workers who were alleged to be an identifiable minority group, an identifiable sexual group, and an identifiable economic group of poor wage earners, *Held*, a legislative classification may not be found invalid without a showing that Congress intended to discriminate and such intent may not be inferred from allegation that Congress knew or should have known that the class was composed principally of minority members. *Further held*, the requirement has a sufficiently rational basis in covering regularly employed domestic workers despite fact, recognized by the Congress, that some such workers (e.g., those employed by several employers for a few days per quarter) would be excluded from the classification.

PELL, CIRCUIT JUDGE:

This is an appeal from a judgment of the district court affirming the decision of the Secretary of the United States Department of Health, Education, and Welfare denying compensation insofar as plaintiff's complaint sought review of that decision and dismissing the remainder of the complaint. Plaintiff[1] is a black woman who worked for various persons as a domestic servant until July 1966. She worked as a dishwasher at a hotel from July of 1966 until October 1968 at which time she was injured while working. Her complaint alleges that this injury resulted in her becoming disabled within the meaning of various subsections of the Social Security Act. 42 U.S.C. § 423; 20 C.F.R. § 404.1501ff. She filed a claim under 42 U.S.C. § 401ff. Her claim was denied by the hearing examiner of the Social Security Administration (now Administrative Law Judge; hereinafter ALJ) on the grounds that she failed to establish eligibility for disability compensation by showing the requisite earnings during the preceding 40 quarters, principally because of a lack of showing of compensation of at least $50.00 per quarter for sufficient quarters from a single employer for the period during which she worked as a domestic employee. 42 U.S.C. §§ 423(c)(i)(b)(i), 409 (g)(2). See also 26 U.S.C. § 3121(a)(7)(B).

The Appeals Council affirmed this decision, and plaintiff filed this action for review under 42 U.S.C. § 405(g) in addition to seeking other relief.

Count I of plaintiff's complaint alleges that the conclusions of the ALJ were not supported by substantial evidence. On appeal she argues that the ALJ applied too strict a standard in determining that plaintiff had not met her burden. In Count II of the complaint, plaintiff alleges that the Secretary of the Treasury and his delegate (the Commissioner of Internal Revenue) have failed "to compel, to attempt to compel, or to take prudent measures to compel" the collection of the employment tax. Plaintiff seeks mandamus relief to compel the collection of the employment tax on domestic workers' salaries if the $50.00 per employer per quarter limitation is declared unconstitutional or mandamus to compel the Commissioner to require reporting of all domestic workers' wages paid if the limitations are upheld. See 26 U.S.C. § 3121(a)(7)(b). Count III of the complaint seeks a permanent injunction against the Secretary of the Treasury, the Secretary of the Department of Health, Education, and Welfare, and the Commissioner of Internal Revenue enjoining them from enforcing the one employer earnings requirement against black citizens. She alleges that these provisions are void because:

> "they segregate a certain class of all employees by race and status to be denied disability insurance under the Social Security Act and therefore deny them civil and human rights inhering in the due process clause of U.S. Const. Amends. V, XIII and XIV, and freedom from slavery and servitude guaranteed by U.S. Const. Amend. XIII. These irrational, arbitrary conditions . . . perpetuate bondage and peonage, forbidden by terms of U.S. Const. Amend. XIII and the Anti-Peonage Act. 42 U.S.C.A. 1994 (1969)."

Counts II and III are brought as a class action. The complaint was later amended to ask for a declaration that the minimum earnings requirement during a certain number of quarters as such was unconstitutional and for an injunction against its enforcement. The complaint was also amended to plead that domestic workers are an identifiable black racial group, an identifiable sexual group of women, and an identifiable economic group of poor wage-earners. On appeal, plaintiff argues that the district court erred in dismissing each count and also erred in not convening a three-judge court. The plaintiff urges us to decide the constitutional question rather than remanding for a three-judge court to be constituted. According to plaintiff, all the facts needed for us to decide this portion of the case are matters of public record.

I. Sufficiency of Evidence

We must uphold the decision of the Secretary if it is supported by substantial evidence. 42 U.S.C. § 405(g). In his opinion the ALJ stated:

> "Following the expiration of the statue of limitations with respect to any

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[1] Sometime subsequent to the filing of her complaint but prior to the judgment in the district court, Eula Mae Fisher died. This fact came to the attention of the governmental defendants through the filing of a death claim by her husband. Upon motion of the defendants, the husband as administrator of the estate was substituted in this court as party plaintiff. For convenience of reference, however, in this opinion we have treated the matter as though Mrs. Fisher continues as the active claimant.

> year the absence of any entry of the Secretary's records as to the wages alleged to have been paid by an employer to an individual during any period in such year shall be presumptive evidence that no such alleged wages were paid to such individual in such period."

This quotation is an accurate paraphrase (almost a quotation) of 42 U.S.C. § 405(c)(4)(B) and 20 C.F.R. § 404.804, under which the ALJ was required to evaluate the evidence.

As a part of his evaluation of the evidence, the ALJ stated:

> "Since in the instant case there is no showing of wages on the individual's earnings record for the periods in question, the evidence required to prove the alleged wages must be *substantial* and *of probative value* and must clearly establish both the amount of wages paid and the time of payment. Moreover, the evidence necessary to establish these wages for a period in a year or years when the statutory limitation has expired must also be sufficient *to overcome the statutory presumption that no such wages were paid.*
>
> "The record before the hearing examiner is *void of factual or conclusive evidence to substantiate the claimant's allegations of wages paid during the period involved.* Since the claimant has been unable to meet the burden of proof and has failed to furnish adequate evidence of alleged wages paid to establish additional quarters of coverage, the hearing examiner is constrained to conclude that the claimant lacks the necessary quarters of coverage to be fully insured and that she is not entitled to disability insurance benefits." (Italics added.)

Plaintiff argues that the italicized phrases show that the ALJ required her to meet too heavy a burden of proof and that he ignored her testimony. She principally relies on *Breeden* v. *Weinberger*. 493 F.2d 1002 (4th Cir. 1974), and *Kephart* v. *Richardson*, 505 F.2d 1085 (3d Cir. 1974).

The consideration of these cases takes us on the customarily difficult journey on the shimmering semantical sands involved when an effort is made to put into words the concept of the dispositive effect of a presumption when the determiner of ultimate fact also has before him other evidence.

In *Breeden* the court reversed a decision in which the ALJ and the district court had required the claimant to prove her case by "clear and convincing evidence." The Fourth Circuit held that the presumption did not alter the burden of proof requirement that claimant need only prove his administrative claim by a preponderance of the evidence. The court further held, however, that the statutory presumption here involved did not vanish when contradictory evidence was introduced under the Thayer "bursting bubble" theory of presumptions, but rather that the presumption would survive the offering of contradictory evidence and could thereafter constitute substantial evidence that no wages were paid. 493 F.2d at 1007.

Upon the basis of the evidence in the case before it, which evidence need not be repeated here, the Fourth Circuit concluded that the administrative decision was not supported by substantial evidence. A reading of the opinion makes it obvious that a substantial motivating factor in the court's decision was the arbitrary rejection of evidence by both the ALJ and the Appeals Council. It, of course, can scarcely be contended that the statutory presumption should be the basis for rejecting consideration of evidence simply because it is contrary to that created by the presumption.

In *Kephart* the Third Circuit reversed and remanded for further proceedings the denial of a claim on the grounds that the ALJ had applied too strict a standard in requiring "substantial evidence . . . sufficient to rebut the presumption of validity accorded by law to the Secretary's wage records." 505 F.2d at 1088. The court recognized that the Wigmore (Thayer) theory of presumptions did not apply to this statutory presumption but held that it is merely one evidentiary factor to be weighed along with other evidence. The court also stated, 505 F.2d at 1089, that it saw nothing in the statute which required the claimant to rebut the negative condition of the records by "substantial evidence," citing on a "*cf.*" basis *Thacker* v. *Gardner*, 268 F. Supp. 663 (W.D. Va.), aff'd, 387 F.2d 387 (4th Cir. 1967), *cert. denied*, 390 U.S. 1017. We note that although the court denied the need for corroboration of the claimant's testimony if the ALJ found his testimony credible, in *Kephart* the claimant's testimony was in fact corroborated by his wife and three other persons. Corroboration of testimony can, of course, be a strong factor in minimizing doubts an ALJ might have regarding a claimant's testimony.

The defendants in the present case in support of the determination below rely in part upon *Thacker, supra*. However, in *Breeden* the court stated that it "did not necessarily approve the district court's apparent insistence on 'positive evidence.' " The court went on to state that its per curiam opinion affirming in *Thacker* merely noted that there was substantial evidence supporting the administrative decision and that the evidence in that case was far weaker than in the present case. 493 F.2d at 1005 n.3.

In final analysis it appears to us that we have to determine whether the italicized words in the ALJ's evaluation of the evidence so clearly indicate that an incorrect standard was in fact applied as to cause us to determine ultimately that his decision was not supported by substantial evidence.

Having carefully studied the ALJ's opinion, we cannot conclude that he applied an improper standard in evaluating plaintiff's claim. While it may not be necessary for there to be substantial or positive evidence specifically rebutting the statutory presumption before the ALJ can find for claimant, there must be substantial evidence in the record as a whole supporting his decision or it is subject to attack on appeal. 42 U.S.C. § 405(g). As we read his entire opinion, the ALJ was doing no more than stating this proposition when he referred to evidence that is "substantial and of probative value." Evidence, of course, cannot be substantial if it is not of probative value. Both *Breeden* and *Kephart* were factually much stronger cases for the claimants than this case.

Similarly we cannot find that the ALJ ignored plaintiff's testimony. His discussion of the evidence shows that he was aware of her contentions even though he found neither "factual" nor "conclusive" evidence supporting her claim. In context it appears he was doing no more than stating that he did not credit her testimony. Some of the ALJ's characterization language is perhaps unfortunate. Ordinarily one would not say that the record was "void of factual or conclusive evidence" as meaning that there was evidence (here by the claimant) which was found not to be credible. While this would not seem to be an accurate equation, nevertheless, we can reach no conclusion other than the ALJ considering all of the evidence before him, including that of the claimant, found her testimony sufficiently lacking in credibility to overcome the affirmative evidence of lack of requisite payment when considered in the context of the statutory presumption. We agree with *Breeden* that the presumption did not evaporate. 493 F.2d at 1007.

We have no basis for doubting the verity of the ALJ's statement that he had carefully considered the very excellent brief submitted by Mrs. Fisher's counsel, "the depositions he furnished from former employers of the claimant *and from Mrs. Fisher*, as well as numerous statements from former employers." On these bases, he found that Mrs. Fisher had failed "*to furnish adequate evidence*" and he was therefore constrained to conclude that she lacked the necessary quarters of coverage. (Emphasis added.)

Plaintiff, however, argues that the opposing evidence of the employers was conclusory and contradictory principally in that the witnesses stated little more than that they did not pay Mrs. Fisher more than $50.00 per quarter. This, however, is a factual matter in which lay witnesses are dealing only with amounts susceptible of precise mathematical determination. Also some of the evidence was more specific than the general denial of the requisite amount. We cannot assume that the ALJ in evaluating the employer's testimony would not have been aware of an underlying motivation to be forgetful if an employer had in fact not filed returns and paid taxes which he legally was required to do.

The question is not whether we would have reached the same conclusion as did the ALJ if we had been the trier of fact. Our sole inquiry is whether his decision is supported by substantial evidence. We cannot say that it is not.

II. Constitutionality

A. *Jurisdiction*

While this case was under advisement, the Supreme Court decided *Weinberger* v. *Salfi*, ... U.S. ...., 43 U.S. L.W. 4985 (June 26, 1975), which calls to our attention a serious question regarding our jurisdiction to consider the constitutional claims, an issue which was not raised, briefed or argued. The complaint alleges jurisdiction for the class action claims "through U.S. Const. Amends. V, XIII, and XIV and 28 U.S.C.A. Sec. 1331 (a), 1343 (4), 1346 (a) (2), 1361, 2201, 2202, and 2282."

The third sentence of 42 U.S.C. § 405 (h) provides: "No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter." Prior to the 1948 recodification of Title 28, § 41 included the jurisdictional provisions which are now contained, *inter alia*, in §§ 1331 (a), 1343 (4), and 1346(a) (2). Therefore these sections cannot provide jurisdiction against the enumerated officers. Section 1361 provides jurisdiction in the nature of mandamus to compel officers and employees of the United States to perform their duty. The only mandamus relief sought is against the Secretary of the Treasury and the Commissioner of Internal Revenue. This section does not provide jurisdiction to hear the constitutional challenges. The mandamus issue is treated in part III, *infra.* Sections 2201 and 2202 provide authorization for the federal courts to grant declaratory relief. They do not provide an independent basis for jurisdiction. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). Section 2282 only provides that a constitutional challenge to a federal statute seeking injunctive relief must be heard by a three-judge court. Thus, under *Salfi*, we hold that there was no jurisdiction as to the class action claims against the Secretary of Health, Education, and Welfare. *Salfi* makes it clear that this court has jurisdiction to consider Mrs. Fisher's constitutional claim. Whether an injunction would be proper relief under § 408 (g) was not decided by the Supreme Court in *Salfi*. 43 U.S.L.W. at 4989 n.8. Because of our decision regarding the insubstantiality of Mrs. Fisher's constitutional claim, we need not reach the question of the propriety of injunctive relief. The claims which were sought to be asserted as class actions against the Secretary of the Treasury and the Commissioner of Internal Revenue are in no better position than those of Mrs. Fisher against the Secretary of Health, Education, and Welfare, which individual claims we must decide. See 26 U.S.C. § 7421.

B. *Equal Protection and Due Process*

In determining whether plaintiff's constitutional claims were properly dismissed, we must accept the allegations of the complaint as true. *Conley* v. *Gibson*, 355 U.S. 41, 45–46 (1957). In *Sheehan* v. *Scott*, ... F.2d ....., No. 74–1281 (7th Cir. July 22, 1975), we recently restated the standard for determining whether a single judge can dismiss a claim which would be required to be heard by a three-judge court, quoting from *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962):

> "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief and whether the case presented otherwise comes within the requirements of the three-judge statute." Slip opinion at 3. *Cf Wojcik* v. Levitt, ... F.2d ...., No. 74–1661 (7th Cir. April 9, 1975).

The Social Security Act originally excluded domestic workers from coverage entirely. Act of August 14, 1935, ch. 531, § 210 (b) (2), 49 Stat. 625. In 1950 the Act was amended to cover domestic employees if they earned $50.00 per quarter from a particular employer and worked at least 24 days for that employer. Act of August 28, 1950, ch. 809, § 104 (a), 64 Stat. 493. The present section was enacted in 1954. Act of September 1, 1954, ch. 1206 § 101 (a) (1), 68 Stat. 1052.

In the early cases of *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495 (1937), and *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937), a Social Security Act sponsored State Unemployment Compensation Act and the Social Security Act itself were held constitutional against attacks which raised Fourteenth Amendment and Fifth Amendment issues of equal protection and due process arising, *inter alia*, from the exemption for domestic workers. The Social Security Act was similarly challenged and upheld after the 1950 domestic servant provisions became effective. *Abney* v. *Campbell*, 206 F.2d 836 (5th Cir. 1953), *cert. denied*, 346 U. S. 924 (1954). None of these cases, however, involved claims of racial, economic, or sexual discrimination.

Recently the agricultural workers exclusion from coverage was challenged on the grounds that any justifiable basis it might originally have had was no longer valid. *Romero* v. *Hodgson*, 319 F. Supp. 1201 (N.D. Calif. 1970), *aff'd*, 403 U.S. 901 (1971). The court upheld the validity of the exclusion, applying the "any conceivable set of facts" test stating that under-inclusive classifications are particularly resistant to judicial challenge. Courts do not require the state to remedy all aspects of a problem or none at all. No allegation of racial, sexual, or economic discrimination was made in the lower court. The agricultural exclusion was also challenged in *Doe* v. *Hodgson*, 344 F. Supp. 964 (S.D.N.Y. 1972), *aff'd* (with opinion), 478 F.2d 537 (2d Cir. 1973), *cert. denied*, 414 U.S. 1096. In *Doe* the argument was made that the exclusion was racially discriminatory because agricultural workers were "overwhelmingly black and chicano." 344 F. Supp. at 966. The lower court denied the petition to convene a three-judge court noting that the same racial argument had been made in the Jurisdictional Statement to the Supreme Court in *Romero*. The Second Circuit affirmed without placing emphasis on the Jurisdictional Statement.

While there has been some lack of clarity as to the exact effect of a summary affirmance or a dismissal for want of a substantial federal question by the Supreme Court, we are constrained by the recent decision in *Hicks* v. *Miranda*, ... U.S. ....., 43 U.S.L.W. 4857, 4860 (June 24, 1975), to deem this court bound by summary decisions of the Supreme Court until informed that we are not. However, the plaintiff argues that the present case nevertheless is not controlled by *Romero-Doe* because of several distinguishing features: the domestic worker classification is claimed to be particularly suspect because as a class this type of worker reflects all three suspect classifications of race, sex, and economics; and the agricultural workers were totally excluded from coverage while domestic workers purport to be covered but are subject to much more stringent standards for qualifying than are other covered employees. We therefore deem it advisable to review the applicable law.

Much of our analysis is in the terms argued by plaintiff of the equal protection clause of the Fourteenth Amendment. Since this case involves a challenge to a federal statute, the Fourteenth Amendment is not directly implicated. Nevertheless, where a federal statute meets the equal protection tests under the Fourteenth Amendment, it is perforce consistent with the due process clause of the Fifth Amendment. *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971); *cf. Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954).

Racial classifications are, of course, inherently suspect. *McLaughlin* v. *Florida*, 379 U.S. 184 (1964). Plaintiff argues that sexual and economic classifications are subject to similar scrutiny. If we found discrimination and the government attempted to justify the classifications, then we would have to face this issue. First, however, plaintiff must show an intent to discriminate.

Plaintiff places heavy reliance on statistics which she alleges show that domestic workers are a class of poor, black women. Nevertheless, she correctly admits that statistical disproportion in a class drawn in social welfare legislation is not a sufficient basis to declare the statute void. Some showing of intent is required, but it is unclear from prior cases exactly what that showing must be.

In *Jefferson* v. *Hackney*, 406 U.S. 535 (1972), plaintiffs challenged a percentage reduction system which lowered Aid to Families with Dependent Children (AFDC) benefits to a larger extent than other aid programs. Statistics showed that a much larger percentage of AFDC recipients were black or chicano than the recipients of the other programs. The district court found that welfare officials did not know the racial make up of the categories of recipients and that the reduction was not the result of racial or ethnic prejudice. Citing *Dandridge* v. *Williams*, 397 U.S. 471 (1970), the Court reaffirmed that a state does not violate the equal protection clause merely because the classifications made by its laws are imperfect. It held:

> "So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket." 406 U.S. at 546.

A similar challenge was made to a three-judge court in *Stanley* v. *Brown*, 313 F. Supp. 749 (W.D. Va. 1970). The plaintiffs argued that a ceiling on AFDC benefits was invalid. The ceiling had been placed on the program only a year after a study showed that the majority of AFDC recipients were black. It was also claimed that Virginia had a history of discrimination against black people in other ways. The court noted that there was no overt discrimination and refused to infer discrimination. The court found the reasons for the ceiling were sufficient to uphold it. A similar result on similar facts was reached in *Ward* v. *Winstead*, 314 F. Supp. 1225 (N.D. Miss. 1970), *appeal dismissed*, 400 U.S. 1019 (1971) (three-judge court).

Plaintiff argues that intent should be found where it can be shown that Congress knew or should have known that a class was composed principally of minority members. In so arguing plaintiff suggests the analogies of school desegregation cases and juror selection cases. *E.g.*, *United States* v. *Board of School Commissioners*, 474 F.2d 81 (7th Cir. 1973), *cert denied*, 413 U.S. 920; *Avery* v. *Georgia*, 345 U.S. 559 (1953). As we read the school desegregation cases, more than mere knowledge is required. In *Board of School Commissioners*, for example, it was the consistent pattern of actions which resulted in this court finding intentional discrimination. In the jury cases the opportunity to discriminate combined with knowledge of potential jurors' race has been held sufficient to show discrimination at least where statistically improbable panels result.

In her reply brief, plaintiff cites *Clark* v. *Universal Builders, Inc.*, 501 F.2d 324 (7th Cir. 1974), *cert, denied*, ... U.S. ....., 43 U.S.L.W. 3349, and *Norwalk CORE* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968). Both are housing cases, and as plaintiff states in her original brief, they are inappropriate models for that reason. In areas such as housing rights, where Congress has acted, courts may find intent to be inferred from a showing of discriminatory effects alone.

No case has been cited to us which adopts plaintiff's far-reaching theory as applied to a legislature or Congress. Under her theory any classification could be challenged if any data was available, whether Congress was aware of it or not, which showed that a class contained a high percentage of minorities. That this is not the law follows from *Jefferson* v. *Hackney, supra.* Even though the district court found that welfare officials did not know the racial makeup of the AFDC recipients, they should have known it because they could have taken a survey or perhaps someone had collected the data. As the Supreme Court said in *Jefferson:*

> "The acceptance of appellant's constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be." 406 U.S. at 548.

We now must consider whether the statute has a sufficient rational basis under the test of *Dandridge* v. *Williams, supra:* "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." 397 U.S. at 485. A statute is not unconstitutional because the legislature determined to make reforms one step at a time. *Williamson* v. *Lee Optical,* 348 U.S. 483 (1955); *Romero, supra.* The legislative history of the domestic worker provisions of the Social Security Act shows such a pattern.

The Senate Report on the 1950 amendments to the Social Security Act shows that Congress was concerned about domestic employees but was also concerned with the difficulties associated with their coverage. The committee report stated:

> "4. Employees in domestic service.—This group, whose need for the protection of social insurance is very great, is not covered under present law. They have been excluded mainly because of the administrative difficulties which were believed to be involved in their coverage. Your committee is convinced that regularly employed domestic workers can now be covered without undue administrative difficulties. Domestic servants in private homes, other than those on farms operated for profit, would be covered with respect to their services in a calendar quarter for a particular employer if they earned at least $50 in cash wages and either (a) worked at least 24 days for that employer in the current quarter or (b) had worked for the employer on 24 days or more and had earned cash wages of $50 or more in the preceding quarter. Under this definition of a "regular" worker, most non-farm domestic employees who are hired on a weekly or monthly basis will be covered, while most part-time workers, and all casual or intermittent workers, will be excluded from coverage. . . .
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> ". . . On the other hand, the 26-day requirement was reduced to 24 days to permit coverage of the domestic worker who has 'a twice-a-week job,' but who misses 1 or 2 days in a 3-month period." Sen. Rep. No. 1669, 81st Cong., 2d Sess., 2 U.S. Code Cong. Serv. 3287, 3302 (1950).

We note that the administrative difficulties would be much greater in collecting tax from employers of domestic workers, who probably are more numerous than their employees, than collecting tax from industrial employers, who typically employ a substantial number of employees. The expenses of collection could conceivably equal or exceed the tax collected.

In addition it would be unfair to persons who only worked occasionally to collect tax from them when there was little hope that they would ever be eligible for coverage. The report also shows that Congress was not being arbitrary in choosing a 24-day requirement.

In 1954 Congress further expanded coverage. It had experimented with coverage of domestic workers and presumably determined that less rigid restrictions would sufficiently serve its purposes. It stated:

> "[The amendment] would delete the unnecessary and complicated requirement of present law limiting the coverage of domestic workers to those who work for a single employer on 24 days during a calendar quarter. The simplified test of coverage for domestic services in private homes provided by the bill would cover, during the course of a year, about 250,000 more household workers than does the present law. It would also afford additional coverage for from 50,000 to 100,000 workers who under present law are covered on some but not all of their domestic jobs.
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> "More of the domestic workers who would continue to be excluded from coverage would be students, housewives, and others who spend comparatively little time working for pay. Under the bill almost 90 percent of the persons whose major activity is domestic employment would be covered." Sen. Rep. No. 1987, 83d Cong., 2d Sess., 3 U.S. Code Cong. and Admin. News 3710, 3717 (1954).

Thus, Congress realized that not all regularly employed domestic workers were covered, such as those who are employed by several employers for a few days a quarter, but nevertheless determined the class it wished to cover. A law is not invalid because a classification made by the legislature is imperfect. *Jefferson, supra.*

Finally, it appears that the statistics which the plaintiff stresses at great length stop short of refuting the legislative expression that those who would no longer have coverage would be a minimal group not primarily concerned with the matter of making a living from the performance of domestic work. The thrust of the plaintiff's statistics is that the chief component human group in the domestic worker segment of the labor market are poor black women. We have no reason to believe this may not be so but the statistics tendered to us did not go forward to show that any significant number of those who engaged in this manner of earning a livelihood were deprived of coverage by virtue of quarterly coverage requirement. Lack of coverage resulting from the failure to report whether because of the employer not wanting to do so or the reluctance of the employee to become involved in reporting her wages to the government is no basis for holding the classification as established to be in violation of the constitution.

C. *Irrebuttable Presumption*

Plaintiff argues that the legislative history shows that Congress' purpose in enacting the limitations on coverage was to cover regularly employed domestic servants and that it was improper for Congress to presume irrebutably that anyone who did not meet the statutory standards was not regularly employed.

The Supreme Court rejected a very similar argument regarding a minimum period of marriage requirement of a different section of the Social Security Act in *Weinberger* v. *Salfi*, *supra*, distinguishing such cases as *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974), and *Vlandis* v. *Kline*, 412 U.S. 441 (1973), upon which plaintiff relies. The majority, in an opinion written by Mr. Justice Rehnquist, set forth the proper principles to apply in considering constitutional challenges to this type of social welfare legislation. 43 U.S.L.W. at 4991. We have endeavored to apply those principles in part II. B of this opinion. The Court further stated:

> "The question is whether Congress, its concern having been reasonably aroused by the possibility of an abuse which it legitimately desired to avoid, could rationally have concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule. . . .
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> ". . . [The] duration-of-relationship requirement represents not merely a substantive policy determination that benefits should be awarded only on the basis of genuine marital relationships, but also a substantive policy determination that limited resources would not be well spent in making individual determination." 43 U.S.L.W. 4993–95.

As noted by Mr. Justice Rehnquist in his dissent in *LaFleur*, almost any law could be in some sense characterized as an irrebutable presumption. In the normal case, well established standards of equal protection and due process should be applied to determine the validity of a Congressional enactment. It is only an unusual case where a statute will be declared invalid because of an improper irrebutable presumption, and the same result would not be reached applying normal equal protection and due process standards.

D. *Minimum Earnings Requirement*

As was discussed earlier, the amended complaint asked for a declaration that the minimum earnings requirement for a certain number of quarters as such was unconstitutional. By applying the well established standards discussed above, the argument lacks substantiality.

III. Mandamus

Plaintiff's complaint seeks a writ mandating the Secretary of the Treasury and the Commissioner of Internal Revenue to require the reporting of all wages paid domestic servants regardless of whether they exceed the statutory minimums. According to plaintiff this would ensure greater compliance with the law and largely eliminate the problems of incomplete records such as she had. Plaintiff may or may not be correct in her analysis regarding the efficacy of these measures, but the Secretary has a large degree of discretion in determining the proper measures to take to enforce the tax laws. In addition, enforcing these reporting requirements would present many of the administrative difficulties which caused Congress to exclude employees of certain employers from coverage.

For the reasons hereinbefore set forth, the judgment of the district court is

AFFIRMED.

Employer/Employee Relationship

SECTIONS 209 and 210(j)(2) (42 U.S.C. 409 and 410(j)(2))—EMPLOYER/EMPLOYEE RELATIONSHIP—FAMILY EMPLOYMENT

20 CFR 404.1004(c) SSR 76-13a

Where claimant, an applicant for old-age insurance benefits, performed domestic services for remuneration in the household of her sister but such remuneration was subsequently returned *in toto* to the sister, and where claimant was not supervised, controlled or directed by the sister in the performance of the household duties and no contract of employment existed between claimant and her sister, *held*, claimant is not entitled to old-age insurance benefits since the domestic services were not performed within a bona fide employer/employee relationship as defined in section 210(j)(2) of the Social Security Act, the household arrangement having been motivated by mutual benefits and family ties, and the remuneration paid to the claimant did not constitute wages within the meaning of section 209 of the Act.

The claimant, born on March 21, 1902, filed an application for old-age insurance benefits on January 16, 1973, indicating that she had been employed by her sister from January 1972 through June 1972 and since October 1972. She revealed in an accompanying statement dated January 16, 1973, that her sister paid her $100 per month for housekeeping services.

The claimant worked as a teacher for many years, but a record of her earnings maintained by the Social Security Administration dated February 2, 1973, reveals that her teaching earnings were covered under the Social Security Act only during the years 1956, 1957, 1958 and 1959 during which time she acquired 9 quarters of coverage. From August 1959 until her retirement in May 1971, the claimant worked for the United States Government in Japan, teaching dependents of United States servicemen. The claimant had intended to teach at a private school in the United States after the completion of her teaching duties in Japan in order to secure the four quarters of coverage she required for entitlement to old-age insurance benefits. When the claimant returned to the United States in July 1971, however, she was blind in her left eye because of an unsuccessful cataract operation performed in March 1971, and was also going blind in her right eye. As a result, she was unable to teach or drive to any place to do gainful work.

The claimant lived at her home in Pennsylvania during the summer of 1971, but in the fall of 1971 she went to live with her sister in New Jersey so that she could be near an eye specialist. The sister also was a school teacher and the claimant did housework while her sister was teaching.

The sister indicated on a statement dated January 16, 1973, that she employed the claimant on January 1, 1972, through necessity, because she worked full time and needed someone to care for the household. She stated that she paid all the household expenses, but did not claim the claimant as a dependent on her tax returns. During the 3 summer months, she and the claimant vacationed in Pennsylvania.

Contact made with the claimant on January 16, 1973, revealed that she and her sister were the only occupants of the household. She indicated that there was no contractual agreement, written or oral, between her and her sister and that her sister did not control or direct her because she knew what had to be done. A Report of Contact made with the claimant on February 12, 1973, indicates that she performed the same work for her sister from September 1971 through December 1971 without wages and that there was no specific reason why her sister suddenly required a housekeeper.

A Statement of Employer signed by the sister on January 17, 1973, indicates that wages of $300 were paid to the claimant during each of the calendar quarters ending March 1972, June 1972, December 1972 and March 1973. Cancelled checks in the amount of $300 made out to the claimant dated April 1, 1972, June 30, 1972, December 30, 1972, and April 3, 1973, and cancelled checks payable to Internal Revenue dated April 1, 1972, June 30, 1972, December 31, 1972, and April 2, 1973, signed by the sister, were submitted as evidence that the wages were paid and reported timely.

An Employment Relationship Questionnaire dated November 1, 1973, signed by the sister, indicates that the claimant cleaned, washed and ironed, cooked meals and did dishes. It was stated that she expected the work to be done when she came home from work and to be done the way she wanted it. The claimant was allegedly under her control, supervision, and direction and was not free to work for others.

A Domestic Service Questionnaire signed by the claimant on April 3, 1974, indicates that it was agreed by her and her sister that she would do all the light housework. She allegedly worked 7 days a week about 4 hours a day, but indicated that there were no specific hours in which she was required to do the work. She stated that her sister had the right to instruct her, but that it wasn't necessary since she knew how to do the work. The employment relationship was said to have ended on April 1, 1973, because she had an eye operation and was no longer able to work after that date. After April 1, 1973, the sister hired another person to do the housework on a part-time basis.

At the hearing before the Appeals Council, the claimant testified that she and her sister, who is six years younger, had an oral agreement. She stated that her hours were flexible, but that she always had dinner ready when her sister came home from work. She indicated that she sometimes had difficulty performing the work, but kept at it in order to acquire the quarters of coverage. The claimant admitted that she did similar work for her sister during the months prior to January 1972, when she was not paid. It was stated that for many years her sister had a woman come every two weeks to help with the housework, but that the woman died about 1970. After the woman's death, the sister was said to have had no regular lady, but once in a while had someone come in.

The claimant testified before the Appeals Council that she deposited the checks received from her sister into her checking account. She was asked whether she gave any money to her sister and replied, "I must be honest about this. I paid her what she paid me."

Section 209 of the Social Security Act provides, as pertinent here, that the term "wages" means remuneration paid for employment, except that such terms shall not include remuneration paid in any medium other than cash to an employee for domestic service in the private home of the employer.

Section 210(j)(2) of the Social Security Act provides as pertinent, that the term "employee" means any individual who, under the usual common-law rules applicable in determining the employer/employee relationship, has the status of an employee.

Section 404.1004(c) of the Social Security Administration Regulations No. 4 provides, in pertinent part, that an employment relationship exists under the usual common-law rules when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which the result is to be accomplished; that is, an employee is subject to the will and control of an employer not only as to what shall be done but how it shall be done. Whether the relationship of employer and employee exists under the usual common-law rules will, in doubtful cases, be determined upon an examination of particular facts of each case.

Whether a bona fide employment relationship exists in a given case is essentially a question of fact and, while the basic principles are the same in cases involving alleged employment between family members as in those where no family relationship exists, there is a difference between creating a bona fide employment relationship and merely giving to certain purported payments the color of wages for the purpose of qualifying for old-age insurance benefits. The latter is neither within the letter nor the spirit of the law. *Gancher* v. *Hobby*, 145 F. Supp. 461. Whether a claimant was an "employee" receiving "wages" for the requisite period is a question to be determined from all the evidence in this case. *Domanski* v. *Celebrezze*, 323 F.2d 882; *Folsom* v. *O'Neal*, 250 F.2d 946. In determining whether a bona fide employment relationship exists, the courts have held that the Social Security Administration has ". . . both the right and the duty to scrutinize with care the actuality of the relationship. . . ." *Hall* v. *Ribicoff*, CCH, UIR, Fed. Para. 14,374; *Thurston* v. *Hobby*, 133 F.Supp. 205.

The Appeals Council carefully considered this case and, while it did not question the fact that the claimant performed domestic services in her sister's home and was a great help to her sister, it was of the opinion that the services performed by the claimant were not performed within an employment relationship. The Appeals Council held that a proper evaluation of the evidentiary facts and circumstances in this case required the conclusion that whatever services the claimant performed and whatever payments she received were the result of a family arrangement motivated by mutual benefits as well as family ties.

The evidence did not establish, in the opinion of the Appeals Council, that there was a rendition of services and cash remuneration for such services pursuant to a contract of employment. The essence of an employment relationship is a contractual arrangement between parties whereby an employee agrees to perform services, subject to the control or reservation of a right to control by the party for whom the services are performed. In the absence of a contract, there is no employment relationship. Making due allowance for their family relationship and the informal nature of the arrangement, there was no indication that the claimant was required to do any minimum amount of work and work special hours, or that she was given any instructions as to the work to be done and the order of services or that such a relationship was contemplated. The record reveals that the services performed beginning January 1972 were the same services that she had performed prior to January 1972, when she received and expected to receive no remuneration. The fact that the sister had no need for a full-time housekeeper either before or after the period of alleged employment indicated that there was no real need for the claimant's services. It was the opinion of the Appeals Council that the claimant would have performed domestic duties for her sister within the course of daily living and that her purpose in going to live with her sister was to be near her eye doctor and not because of a contract of employment. If she had been "fired", nothing would have changed.

Of particular significance to the Appeals Council and an even stronger indication that a true employment relationship did not exist was the revelation made by the claimant during the course of her appearance before the Appeals Council that she paid back to her sister whatever her sister paid to her. In actuality, the claimant received no remuneration for the services performed for her sister. The checks drawn to her order were designed to simulate the payment of wages when in fact no actual payment of wages was intended.

The Appeals Council emphasized that nothing stated in its decision should be construed as implying any unethical conduct by the claimant. Instead, the Appeals Council commended the claimant for the honesty of her testimony before the Administrative Law Judge and the Appeals Council and her unwillingness to distort the facts for personal advantage.

The findings of the Appeals Council were as follows:

1. An employment relationship did not exist between the claimant and her sister during the periods January 1, 1972, through June 30, 1972, and October 1, 1972, through March 31, 1973.
2. The claimant was not paid "wages" by her sister, within the meaning of section 209 of the Social Security Act, in any quarter of the years 1972 and 1973.
3. The claimant has only 9 of the 13 quarters of coverage required for entitlement to old-age insurance benefits.

The Appeals Council, therefore, decided that the claimant is not entitled to old-age insurance benefits pursuant to her application filed on January 16, 1973.

SELF-EMPLOYMENT

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Trade or Business

SECTION 211(c) (42 U.S.C. 411(c))—SELF-EMPLOYMENT—TRADE OR BUSINESS—SERVICES OF NON-PROFESSIONAL FIDUCIARY IN ADMINISTERING RELATIVE'S ESTATE

20 CFR 404.1070 SSR 76–31c

Silverman v. *Secretary, HEW*, USDC, C.D. CA., Civ. No. 75–1142–IH(G) (2/10/76)

In judicial decision upholding the Secretary's determination denying claimant credit for self-employment income on the basis of fees allowed by Probate Court for his services as trustee of a deceased relative's estate, *held*, that while there are rare cases in which the activities of a nonprofessional fiduciary for a single estate may be considered to be self-employment, there was substantial evidence supporting the conclusion that the claimant's activities were not sufficiently extensive to constitute the conduct of a trade or business within the meaning of section 211(a) of the Social Security Act.

HILL, District Judge:

This Report and Recommendation is submitted to the Honorable Irving Hill, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(3) and General Order No. 104–D of the United States District Court for the Central District of California.

On April 1, 1975, plaintiff filed a complaint to review the decision of the Secretary of Health, Education, and Welfare concerning retirement benefits.

On August 8, 1975, defendant filed an answer to the complaint, with a certified copy of the transcript of the administrative record.

Thereafter a motion for summary judgment, with memorandum of points and authorities in support thereof, was filed by defendant, and proposed findings of fact, conclusions of law and judgment were lodged. Plaintiff filed opposition thereto.

On October 7, 1975, the Magistrate heard the motion for summary judgment. It was stipulated that the plaintiff's opposition documents be deemed to include a motion by plaintiff for summary judgment, and that the government's Motion for Summary Judgment be deemed to constitute opposition thereto. After hearing oral argument by counsel, the Magistrate ordered the motions for summary judgment to stand submitted for decision.

DISCUSSION

The Magistrate, having subsequently reviewed the entire transcript, pleadings and memoranda, and having reflected upon the state of the entire record now makes this report.

This action was brought pursuant to § 205(g) of the Social Security Act, as amended, 42 U.S.C.A. § 405(g), to obtain judicial review of a final decision of the Secretary of Health, Education, and Welfare finding that the plaintiff was not entitled to retirement insurance benefits because he was not "fully insured" within the meaning of the Act.

The plaintiff filed an application for retirement insurance benefits on June 12, 1973, alleging that he had been self-employed as a fiduciary from 1969 through 1972. This application was denied initially and on reconsideration on the grounds that the plaintiff did not have sufficient quarters of coverage to be entitled to retirement insurance benefits.

The plaintiff then requested a hearing which was held on October 8, 1974, at Los Angeles, California, where the plaintiff appeared *and testified*. The administrative law judge considered this testimony and all other evidence of record *de novo*, and on October 17, 1974, issued his decision finding that the plaintiff was not entitled to retirement insurance benefits.

The administrative law judge's decision became the final decision of the Secretary of Health, Education, and Welfare when it was approved by the Appeals Council on February 11, 1975, and that decision is now subject to review by this Court.

The plaintiff, who was born on August 16, 1898, filed an application for retirement insurance benefits, and a statement of claimant in support thereof, on June 12, 1973. Plaintiff had previously worked for several years as a civil engineer and for many years had worked part-time as a real estate broker, neither of which jobs were covered by social security. It is undisputed that plaintiff obtained one quarter of insured coverage in 1956. Having attained age 65 in 1963, plaintiff needed 12 quarters (one for each year after 1950 and prior to 1963) of coverage to establish "fully insured status". Plaintiff sought to have four quarters of coverage for each year from 1969 through at least 1972 credited to his social security account, contending that he was self-employed as a non-professional fiduciary during that time.

Plaintiff's uncle died February 27, 1967. Plaintiff served as executor of the estate until 1969, when he assumed responsibilities as trustee of a testimentary trust established by his uncle's will, with the uncle's widow as life beneficiary. Plaintiff was still serving as trustee at the time of his hearing in October, 1974. The estate consisted of a commercial building in Los Angeles which generated rental income by reason of four stores which rented space therein and cash of approximately $10,000. The rental property had an appraised value of $36,000 in 1974, although plaintiff thought it was worth $65,000, so the value of the trust assets, after disbursements, was somewhere between $47,000 and $75,000. Plaintiff received from $500 to $750 per year in fees for his services as trustee, and would receive a one-quarter interest in the estate upon the death of the life beneficiary.

Plaintiff's duties as trustee included keeping the commercial building rented, collecting rent, and getting repairs made. He had no business expenses or office, "as my services are relatively simple as fiduciary". He took care of the estate's bookkeeping and correspondence, which his wife typed. Regarding the amount of time spent as trustee, plaintiff testified that "there isn't a day that I don't have something to do with it" and estimated he had spent 16 hours performing his duties in the month prior to the hearing, September, 1974.

In a letter dated March 13, 1974, plaintiff explained the nature of his trustee responsibilities to support his contention that the trusteeship had been of long duration (since July 15, 1969), involving a complex estate (originally involving two commercial buildings) of very large size (property worth about $60,000, generating $595 monthly rental income). By letter dated October 9, 1974, plaintiff described the amounts of time he spent tending the estate from December, 1973 through February, 1974 as a result of fire damage to the building, and in 1971 due to earthquake damage, including notes of calls and tasks he performed. He also submitted annual reports for each year of his service as trustee of the estate, detailing receipts and disbursements thereof.

The law requires that an applicant for retirement insurance benefits must be "fully insured". 42 U.S.C.A. § 402(a). Pursuant to 42 U.S.C.A. § 414(a), plaintiff herein must have 12 quarters of insured coverage to be fully insured. Plaintiff alleges entitlement to 16 quarters of coverage for the years 1969 through 1972, during which time he received more than $100 in each calendar quarter. See 42 U.S.C.A. § 413(a). The determinative question here is whether plaintiff's services as a non-professional fiduciary constitute a "trade or business" within the meaning of 42 U.S.C.A. § 411(c) so as to qualify plaintiff as a self-employed individual for social security purposes. The Secretary has determined that plaintiff was not engaged in a trade or business and therefore was not entitled to retirement insurance benefits. This decision is supported by substantial evidence in the record and therefore should be affirmed.

Social Security Ruling No. 27 for 1960, SSR 60–27, C.B. 1960–61, pp. 60–61, concerns whether a non-professional fiduciary, such as an administrator or executor of an estate, is engaged in a trade or business within the meaning of 42 U.S.C.A. § 411(c). This Ruling recognizes that the term "trade or business" shall have the same meaning as in section 162 of the Internal Revenue Code, and states that all the facts and circumstances in a particular case must be considered. SSR 60–27 sets forth the following general guidelines:

(1) a professional fiduciary who regularly engages in fiduciary services and handles a number of estate is engaged in a trade or business;

(2) a nonprofessional fiduciary (for example, one who serves as executor in isolated instances, and then as person representative of a deceased friend or relative) generally is not engaged in a trade or business;

(3) a nonprofessional fiduciary who actually carries on a trade or business in connection with administering an estate, such as operating a store which is part of the estate, may have net earnings from self-employment, if:

(a) the trade or business is an asset of the estate,

(b) the fiduciary actually participates in the operation of such trade or business, and

(c) only such fees as are attributable to his operation of the trade or business are net earnings from self-employment.

SSR 60–27 further provides that "in certain rare cases there may be a very large estate which is of such complexity and long duration that its administration requires extensive Management activities over a long period of time." Under such circumstances, "activities of a nonprofessional fiduciary for a single estate may constitute the conduct of a trade or business. . . ." The example presented in SSR 60–27 involved an executrix of an estate consisting of stocks, bonds and a farm, who spent two years distributing the personalty to legatees, renting the farm until a sale could be arranged, and consummating the sale. The executrix did not operate the farm business and it was held that the estate did not require management activities sufficiently extensive to constitute conduct of a trade or business.

The leading social security case concerning what constitutes engaging in a trade or business, which has also been cited with approval in income tax cases, is *McDowell* v. *Ribicoff*, 292 F.2d 174 (3rd Cir. 1961). In a decision finding that the claimant's services as executrix for her aunt's estate did not result in net earnings from self-employment, the Court in *McDowell* discussed IRC § 162 and Rev. Rul. 58–5 and set forth the following explanation at p. 178:

> "The phrase 'trade or business' connotes something more than an act or course of activity engaged in for profit. Indeed, the Internal Revenue Code itself, in Section 165(c), 26 U.S.C. § 165(c), distinguishes between a 'trade or business' on the one hand and a 'transaction entered into for profit' on the other. The phrase 'trade or business' must refer not merely to Acts engaged in for profit, but to extensive activity over a substantial period of time during which the Taxpayer holds himself out as selling goods or services. This is substantially the definition underlying the ruling of the Internal Revenue Service under discussion. Moreover, the ruling is a reasonable and accurate application of this definition to the question as to when a nonprofessional fiduciary is engaged in 'trade or business'. We hold, therefore, that the criteria set forth in the ruling and applied by the Secretary in the present case are fully supported by the statute and embody the governing principles in a case such as that at bar."

Application of the criteria set forth in SSR 60–27, Rev. Rul. 58–5 and *McDowell* v. *Ribicoff*, *supra*, to the facts of this case clearly establishes that the plaintiff here was *not* engaged in a trade or business within the meaning of the Social Security Act and Internal Revenue Code. Plaintiff is a *nonprofessional* fiduciary serving as executor and trustee of a *single* estate, that of a deceased *relative*, his uncle. There was *no* trade or business among the assets of the estate; plaintiff merely rented space in the commercial building to four stores which carried on businesses therein, but did *not* himself conduct such a business. Income from the rental of real estate or other investments is *not* income from a trade or business. See, IRC §§ 162 and 212, 26 U.S.C.A. §§ 162, 212.

It is noted that the income claimed for the "trade or business" self-employment relied on by plaintiff consisted of the fees allowed by the Probate Court for his services as a trustee. The California law does not distinguish between "ordinary" and "extraordinary" services rendered by a trustee, as it does for an executor or administrator of an estate, in determining the compensation to be allowed. Hence the record does not show a division of the fees (approximately $600.00 a year) collected by plaintiff as trustee from 1969–1972.

The extent of this income received is relevant as it bears upon the resolution of whether plaintiff has met the burden of proving entitlement to benefits, including here the establishment of his claim that his fiduciary service in this one estate constituted engaging in a trade or business. It is arguable that the activity of plaintiff is sufficient to be deemed engaging in business.

In an action for retirement benefits, as in other litigation under Title II of the Social Security Act, the Secretary, and not the court, is charged with the responsibility to weigh the evidence, resolve material conflicts in the testimony, and determine the case accordingly. *Lessin* v. *Celebrezze*, 314 F.2d 283 (D.C. Cir., 1963); *Richardson* v. *Perales*, 402 U.S. 389 (1971); *Torske* v. *Richardson*, 484 F.2d 59 (9th Cir. 1973), cert. denied *Torske* v. *Weinberger*, 417 U.S. 933 (1974); *Waters* v. *Gardner*, 452 F.2d 855 (9th Cir. 1971). The Secretary's decision must be affirmed even though there is substantial evidence which would have supported a finding in favor of plaintiff if such a finding had been made. *Rhinehart* v. *Finch*, 438 F.2d 920 (9th Cir. 1971); *Jacobs* v. *Finch*, 421 F.2d 843 (9th Cir. 1970).

The function of the court on review is not to try the matter *de novo*, but to leave the findings of fact to the Secretary and to determine upon the whole record whether the Secretary's decision is supported by substantial evidence. *Beane* v. *Richardson*, 457 F.2d 758 (9th Cir. 1972), cert denied 409 U.S. 859 (1972); *Harmon* v. *Finch*, 460 F.2d 1229 (9th Cir. 1972), cert. denied 409 U.S. 1063 (1972), reh. denied 410 U.S. 918; *McDowell* v. *Ribicoff, supra; Lessin* v. *Celebrezze, supra; Braaksma* v. *Celebrezze, supra.*

Plaintiff has failed to show that he sustained his burden of proving entitlement to retirement insurance benefits, in that there is substantial evidence in the record to sustain the administrative law judge's determination that he was not so entitled.

Pursuant to 28 U.S.C. § 636(b)(3) and General Order No. 104–D, the Court has reviewed the complaint and the proposed Report and Recommendation of the Magistrate on file herein, and on this date concurred with and adopted the findings and conclusions of the Magistrate.

IT IS ADJUDGED that the motion for summary judgment of plaintiff is denied and that the motion for summary judgment of defendant be granted.

Deductions

SECTIONS 203(b) and (f) (42 U.S.C. 403(b) and (f))—SELF-EMPLOYMENT—DEDUCTIONS—SUBSTANTIAL SERVICES.

20 CFR 404.446 and 404.447 SSR 76–21c

TORRANCE v. WEINBERGER, U.S.D.C., W.D. Pa., U.I.R. Fed. #14557 (12/11/75)

In judicial review of Secretary's imposition of work deductions against claimant because of income from trucking business operated by claimant and her son, conflicting record concerning the extent of her work activities included evidence that she spent 4 to 5 hours per week in her home paying all bills, handling the payroll, signing all checks, making bank deposits and making all final decisions with regard to hiring and firing of employees. *Held*, that the Secretary's decision was required to be affirmed because there was substantial evidence to support the finding that claimant had failed to establish that she did not render substantial services in self-employment during the period in question.

SCALERA, DISTRICT JUDGE:

Plaintiff appeals to this court from the final decision of the Secretary of Health, Education and Welfare, denying her social security retirement insurance benefits.[1] Defendant moved for summary judgment.[2] The sole issue before the court is whether the final decision of the Secretary is supported by substantial evidence.

I

On August 15, 1972, plaintiff filed her application for retirement insurance benefits with the Social Security Administration. An initial determination of an appropriate award was certified on October 20, 1972. Thereafter, a resumption of the award was made, dated November 1, 1972, and a certificate of social insurance award dated November 22, 1972, was sent to plaintiff informing her that she did not qualify for benefits because she continued to perform substantial services in connection with self-employment. Plaintiff filed a request for reconsideration of her entitlement on January 31, 1973. The claim was reconsidered and plaintiff was informed by letter dated May 2, 1973, that the original decision was affirmed. A determination of benefit recomputation was made in November 1973, with the same result.

Plaintiff filed a request for a hearing on October 26, 1973. The administrative law judge scheduled the hearing for February 4, 1974, then rescheduled it for February 19, 1974. After the hearing, the administrative law judge determined that plaintiff was entitled to retirement benefits, but that those benefits were subject to total deductions.[3] Plaintiff's claim therefore was denied. The administrative law judge's decision and notice were mailed to plaintiff on June 24, 1974. Plaintiff filed a request for review by the Appeals Council on August 23, 1974. Plaintiff's attorney filed a brief in support of her position with the Appeals Council on or about October 22, 1974. The Appeals Council upheld the decision of the administrative law judge and informed plaintiff of its action by letter dated December 3, 1974.[4]

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[1] Jurisdiction of this court is based upon section 205(g) of the Social Security Act, 42 U.S.C. §405(g), which provides in part:

> The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing.

[2] This court notes that the district Court in Torphy v. Weinberger, 384 F.Supp. 1117, 1119 (E.D. Wisc. 1974), states that:

> 42 U.S.C. §405(g), however, does not admit the use of summary judgment . . . . Whereas summary judgment procedure allows new factual evidence to be submitted to the court in the form of affidavits, section 405(g) contemplates review by the court solely upon the pleadings and transcripts of the Secretary:
>
> * * *
>
> No new evidence may be admitted before this Court in such a proceeding.

That court treated a motion for summary judgment as a motion for an order affirming the decision of the Secretary.

Plaintiff filed her complaint with this court on January 9, 1975. On March 18, 1975, this court signed defendant's consented-to motion for an extension on the time allowed to file an answer, specifying May 16, 1975, as the limitations date. Defendant filed his answer on May 15, 1975. On June 30, 1975, defendant filed a motion for summary judgment together with a supporting brief. On July 1, 1975, this court ordered plaintiff to file a brief in support of her position within thirty days. On August 6, 1975, plaintiff's attorney filed a consented-to motion to extend the time within which to file the supporting brief to August 20, 1975; this court signed the motion on August 11. Plaintiff filed her memorandum of law in support of her position on August 20, 1975.

This court's scope of review in social security cases is found in section 205(g) of the Social Security Act, 42 U.S.C. §405(g):

> The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. . . .

The court does not consider plaintiff's claim *de novo*, but rather reviews the complete record to determine whether the Secretary's decision is supported by substantial evidence. Hess v. Secretary of Health, Education and Welfare, 497 F.2d 837 (3d Cir. 1974).

Section 205(h) of the Act, 42 U.S.C. §405(h), likewise specifies the conclusiveness of the Secretary's findings of fact:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency, except as herein provided.

The principle of conclusiveness applies as well to the inferences reasonably drawn from the evidence. Moreno v. Richardson, 484 F.2d 899 (9th Cir. 1973); Maloney v. Celebrezze, 337 F.2d 231 (3d Cir. 1964).

Substantial evidence consists of more than a mere scintilla. It is such relevant evidence as a reasonable mind would accept as sufficient to support a particular conclusion. Hess v. Secretary of Health, Education and Welfare, *supra*; Blaith v. Weinberger, 378 F.Supp. 596 (E.D. Pa. 1974). The conclusion reached by the Secretary should be affirmed if it withstands scrutiny under the substantial evidence test, even though another conclusion possibly might be drawn from the evidence were the court to appraise the merits of the claim *de novo*. Quinn v. Richardson, 353 F.Supp. 363 (E.D. Pa.), *aff'd*, 485 F.2d 681 (3d Cir. 1973); Blalock v. Richardson, 483 F.2d 773 (4th Cir. 1972). The burden of proof rests upon one filing a claim with an administrative agency to establish that the

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[3] Total deductions were determined in accordance with sections 203(b) and (f) of the Social Security Act, 42 U.S.C. §403(b) and (f).

[4] The administrative law judge's decision became final and binding when it was upheld by the Appeals Council. 20 C.F.R. §404.951, issued pursuant to 42 U.S.C. §405(a).

required conditions of eligibility have been met. Ragan v. Finch, 435 F.2d 239 (6th Cir. 1970), *cert. denied*, 402 U.S. 986, 91 S.Ct. 1685, 29 L.Ed.2d 152 (1971); Quinn v. Richardson, *supra*.

III

The Social Security Act provides for the payment of old-age benefits to fully insured individuals who have attained retirement age and who have filed an application for such benefits.[5]

However, the Act stipulates that the amount of monthly benefits to which an individual is entitled is subject to deductions based upon the receipt of self-employment income.[6] Under the statutory scheme, an individual is presumed, with respect to any month,

> To have been engaged in self-employment in such month until it is shown to the satisfaction of the Secretary that such individual rendered *no substantial services* in such month *with respect to any trade or business* the income or loss of which is includible in computing . . . his net earnings or net loss from self-employment for any taxable year.[7]

This section also specifically directs the Secretary to prescribe by regulation the criteria for determining the substantiality of any business services rendered by the individual.[8]

The regulatory scheme [9] prescribed by the Secretary defines the substantial services test as one of whether, in view of the individual's circumstances and the character of the services rendered, the person can "reasonably be considered retired" in the month in question. Even though an individual performs some services, the services will not be deemed substantial where evidence establishes to the satisfaction of the Administration that the person may reasonably be considered retired.

The factors considered in evaluating whether an individual has performed substantial services are as follows:

(1) The amount of time the individual devoted to all trades and businesses;
(2) The nature of the services rendered by the individual;
(3) The extent and nature of the activity performed by the individual before he allegedly retired as compared with that performed thereafter;
(4) The presence or absence of an adequately qualified paid manager, partner, or family member who manages the business;
(5) The type of business establishment involved;
(6) The amount of capital invested in the trade or business; and
(7) The seasonal nature of the trade or business.[10]

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[5] 42 U.S.C. §402(a).

[6] Sections 203(b) and (f)(1) and (4), 42 U.S.C. §403.

[7] Section 203(f)(4), 42 U.S.C. §403(f)(4) (emphasis added).

[8] Section 205(a), 42 U.S.C. §405(a), establishes the Secretary's regulatory powers in the administration of the Act.

[9] This discussion paraphrases regulations found at 20 C.F.R. §§404.446 and 404.447, the provisions outlining the factors to be considered in determining the substantiality of an individual's services.

[10] 20 C.F.R. §404.446.

The regulations explicate the significance of these criteria individually. As to consideration of the amount of time devoted to the business, "amount of time" includes time spent in physical and mental activity at the place of business or elsewhere in furtherance of the business. Time spent in planning and advising the operations, preparing and maintaining business facilities and records, and time spent at the place of business which cannot reasonably be considered unrelated to business activities are all specifically included within the definition.

Additional guidelines for determining the amount of time devoted to a business are stipulated. If the individual establishes that such time does not exceed forty-five hours in any one month, then the individual's services are not deemed substantial, *unless other factors make such a finding unreasonable*:

> For example, an individual who worked only 15 hours in a month might nevertheless be found to have rendered substantial services if he was managing a sizeable business or engaged in a highly-skilled occupation.[11]

Nonetheless, services of less than fifteen hours in all businesses per month are not substantial. Services of more than forty-five hours in a month are substantial unless the individual establishes upon other grounds that he could reasonably be considered retired.

In a case where a finding that an individual was retired would be unreasonable if time devoted to the business alone is considered, then the nature of the services rendered to the business is also to be examined. The services are considered in view of the technical and management needs of the business. The more regularly an individual renders services to a business, or the more skilled and valuable his services are, the more likely that the individual could not be considered retired.

Where consideration of neither the amount of time nor the nature of the services rendered to the business sufficiently establishes whether the person's services were substantial, the focus is turned to the extent and nature of the services rendered before and after the individual's "retirement:"

> A significant reduction in the amount or importance of services rendered in the business tends to show that the individual is retired; absence of such reduction tends to show that the individual is not retired.[12]

Finally, if evaluation of the above factors together is insufficient for a determination of the substantiality of the person's services, all other factors are considered. These final criteria include the presence or absence of a capable manager, the kind and size of the business, the amount of capital invested, the possibly seasonal nature of the business, and "any other pertinent factors."

The ultimate focus, again, is whether the individual's services are such that he can reasonably be considered to be retired.

IV

The record in this case is extensive, including fifty-nine exhibits and one hundred-plus pages of testimony at the hearing before the administrative law judge. The record of plaintiff's involvement in the business must be examined comprehensively in order to evaluate the character of her services, the amount of time spent in the business, etc., both before and after her alleged "retirement."

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[11] 20 C.F.R. §404.447(a)(1).

[12] 20 C.F.R. §404.447(c).

Plaintiff's husband was a self-employed owner-operator of a small trucking business at the time of his death on November 16, 1959. Evidently the outstanding debts of the business at that time were forcing the operation to ruin. On December 3, 1959, plaintiff, then 53-years-old, filed an application for survivor's insurance benefits on behalf of herself and on behalf of her disabled daughter. Plaintiff's applications were granted and benefits were thereafter paid to plaintiff for herself and on behalf of her daughter.

By virtue of plaintiff's receipt of Mothers' Insurance Benefits under §202(g) of the Act, she was required to make annual reports of her earnings for each taxable year during which she was entitled to monthly benefits. These reports provide a history of plaintiff's earnings per year and in the continued operation of the trucking company, as the following record indicates.

On December 10, 1959, plaintiff reported that she would attempt to continue the operation of the trucking company, although she did not anticipate that the earnings would be over $1,200 per year. She stated that she would advise the Social Security Administration if she earned a net profit in excess of $1,200. On or about April 27, 1961, plaintiff reported that on May 1, 1961, she would begin operation of the trucking company as a self-employed person and that she anticipated her earnings to be about $2,400 per year. On April 19, 1962, plaintiff reported that she had taken over her husband's trucking business, which was a steel-hauling operation contracting with United States Steel Corporation, after his death. She reported that the contract was automatically renewable and required no further negotiations on her part; that her "only work" in connection with the business was to maintain the books, to bill United States Steel for hauling, to receive payments and records from United States Steel, to pay the employee-drivers bi-weekly, and that these efforts required approximately ten hours per week on her part. She further reported that her son drove one of the trucks and performed all managerial and maintenance functions connected with the business, and that the drivers received their orders from United States Steel.

On March 27, 1962, plaintiff submitted the first of the annual reports required by the Social Security Administration. On this report, plaintiff indicated that during 1961 she was engaged in the operation of the business "(a) 11 months, full time management." She also indicated that she expected to earn $1,500 from the business in 1962. Due to confusion over the 1961 earnings listed in this report, plaintiff was requested to submit her 1961 Income Tax Return. The return showed total receipts of $23,415.23, gross profit of $10,258.04, and net profit of $1,332.07. Since her net profit was in excess of $1,200, plaintiff was informed that a certain deduction was applicable against her Mothers' Insurance Benefits.

Plaintiff submitted her second earnings report to the Social Security Administration on April 1, 1963. She reported gross receipts of $29,264.16 and net profit of $1,433.37. She further reported that she did clerical work for the business, "[h]ire[d] help for everything," and worked approximately ten hours per week at the business. On April 13, 1964, plaintiff again submitted an earnings report, indicating total receipts for 1963 of $25,248.24, net earnings of $508.03, and that her involvement in operations amounted to clerical work for approximately ten hours per week.

On April 1, 1966, plaintiff reported that gross receipts for 1965 amounted to $32,199.68, and that her net profit was $2,647.96. On April 8, 1967, she reported that gross recipts for 1966 were $36,611.89 and that her net profit was $3,130.67. Plaintiff was informed that she had been incorrectly overpaid in Mothers' Insurance Benefits, due to the excess of her actual net profit in 1966 over her estimate of the amount the previous year. Plaintiff subsequently reported a net profit from the business of $5,665.15 for 1967; $7,800-plus in 1968; $5,166 in 1969; and $6,893 in 1970. Deductions from plaintiff's Mothers' Insurance Benefits were applied in each of the above years. Plaintiff was notified that, beginning December 1968, when she would be 62-years-old, her Mothers' Insurance Benefits would terminate because she was eligible for Widow's Insurance Benefits on her deceased husband's earnings record. At this time, however, plaintiff was informed that because of her excess earnings, she would not be paid any widow's benefits from December 1968, at least until December 1970.

On March 17, 1970, plaintiff submitted a statement to the Social Security Administration requesting that, effective December 1968, she be withdrawn from eligibility for widow's benefits on her husband's earnings record. On this statement, plaintiff indicated that she was not eligible for cash benefits, as she was ". . . self-employed and perform(ing) substantial services each month." At that time, she also reported that her net earnings were approximately $7,000 per year. She reported that she understood the implications of her withdrawal, but chose to do so as a means of obtaining the highest amount payable to her disabled daughter, and that she would file for retirement insurance benefits based on her own earnings record either when she reached age 65 or when she retired.

Pursuant to plaintiff's application for retirement insurance benefits on August 15, 1972, she was requested to submit annual earnings statements (the requirement that she submit annual earnings reports to the Social Security Administration had ceased when her Mothers' Insurance Benefits terminated). Plaintiff, in response thereto, submitted her income tax returns for 1970 through 1972. Plaintiff's Schedule C tax return—"Profit (or Loss) From Business or Profession (Sole Proprietorship)"—for 1970, listing the business name as Minnie O. Torrance and her own address as the business address, shows gross profits of $112,997.29 and net profit of $6,842.32. Her 1971 Schedule C, still listing her business name and her residence as the business address, shows gross profits of $142,147.73 and net profit of $9,037.24. Plaintiff's 1972 Schedule C, with the same business name and business address, shows gross profits of $150,135.56 and a net profit of $16,419.50. Plaintiff for all three years listed her occupation as "Trucker" on her Form 1040 Individual Income Tax Return. Plaintiff for these years paid Social Security self-employment taxes, claimed depreciation on the business' trucks and tractors, and claimed repair, insurance, fuel, tire, permit and license expenses as business deductions.

V

There is some confusion as to the date from which plaintiff claims retirement insurance benefits without deductions due to excess earnings. On the application for benefits plaintiff filed on August 15, 1972, while stating that her income for 1971 was over $9,000, and that her expected income for 1972 would be approximately $9,000, plaintiff indicated that she had performed no substantial services for the trucking business in any month during 1971 and that she would not do so in any month during 1972. Plaintiff was 65-years-of-age in December 1971. Therefore it was not apparent to the administrative law judge whether she was claiming benefits from January 1971, or from August 1971, when the application was filed. At the hearing, the administrative law judge questioned plaintiff about the claim date and, after several questions, she indicated that she was claiming benefits without deductions due to excess earnings from August 1971. Plaintiff asserted that in that month she had "completely dropped all business activities" because her disabled daughter had fallen approximately at that time and thereafter plaintiff was needed on a full-time basis by her daughter.

Plaintiff appeared at the hearing on February 19, 1974, accompanied by her son, J. Kenneth Torrance, by one of the trucking company's long-time employees, Gilliam King, and by counsel. As the sole issue presented by this case concerns the substantiality of plaintiff's past and present services to the company, only testimony relevant to that point as well as testimony pertaining to the character of the company itself need be reviewed here.

Plaintiff testified that she had no connection with the operation of the company prior to her husband's death in November 1959. She stated that following her husband's death she and her son, who had been employed by the company while his father operated it, decided to continue the company's operation. At that time, the company had approximately three regular drivers who hauled under an annual contract negotiated with United States Steel. Plaintiff and her son testified that the business was carried on under plaintiff's name primarily for financing purposes and to avoid Public Utility Commission "legal formalities" necessarily attendant to a transfer of the business to the son. Plaintiff testified that although she considered herself the owner of the company, her son actually was the manager of the business, as her tasks centered on the clerical aspects of operation, such as keeping records, maintaining the necessary books, paying bills and employees. She further testified that for an unspecified period relatively in the beginning of their combined operation of the company, she and her son would discuss management decisions as they had coffee together in the morning. She left the re-negotiation of the annual contract with United States Steel completely to her son, although she would sign the contracts as the owner of the business. Plaintiff further testified that the trucks were parked at night on a vacant lot that she owned next to her house, but that she had nothing to do with maintenance of the trucks, with scheduling of the runs, or with hiring and firing the drivers. As far as the purchase of additional equipment is concerned, both plaintiff and her son testified that in the early years of their combined operation they would discuss such matters, that plaintiff and her son would co-sign for the purchase of the equipment as early as

1962 and work out other financial matters together. Plaintiff stated that although she performed the above-mentioned services, she considered her son, who drove and maintained the trucks, handled employee and contract matters, and did some bookkeeping, the manager of the business practically from the beginning of their combined efforts. Plaintiff in addition stated that she was a high school graduate, but had never had any business education or training in accounting, record keeping, etc., and that she had not worked outside her home or in her husband's business prior to his death.

The trucking operation as it exists today was described as a small business utilizing approximately eight trucks and employing five to seven drivers.

Plaintiff testified that she continued to perform the duties described above until she was assured that her son could carry on the business without her assistance. She stated that her activities in connection with the business since 1971 have been insubstantial. She stated that she prepares the payroll, which takes one-half hour bi-weekly, that she pays some of the bills, which takes two to three hours per month, and that she signs the annual contract. She stated that she does nothing more in connection with the operation of the business.

Plaintiff testified that it was her son who determined that the net profits would accrue to plaintiff, in order to provide her with an income and to help support plaintiff's disabled daughter, hence the net income of the business is kept by her, while her son is paid bi-weekly according to a standard union wage rate. She further stated that she had considered her business relationship with her son as a "partnership," admittedly without any formal agreement. She considers herself retired from the operation of the business, particularly since her disabled daughter's injury which occurred approximately in August 1971.

Plaintiff testified that, although in her opinion she had not been rendering substantial services to the business since before August 1971, she did not apply for retirement insurance benefits until August 1972, because she mistakenly thought that her high income from the business would prevent her from realizing benefits, that she did not realize prior to that time that the touchstone of eligibility for benefits as applied to her was the substantiality of her services to the company.

VI

Plaintiff's son, J. Kenneth Torrance, testified at the hearing that he worked for his father in the trucking business and that he knew the method of operation, except for the paper work, at the time of his father's death. He stated that plaintiff took over the business in her name, but that her role was centered on the clerical matters and that he did the hauling, negotiating of the contract, and hiring. He also stated that he did some of the paper work, such as the final billing and typing. He stated that, while he did not put any of his own money into the business at this time, neither had plaintiff, that is, any investment into the business came as a result of the conduct of the business itself.

Mr. Torrance testified that before 1971, in addition to making up payrolls and paying all the bills, plaintiff "totalled the slips," which apparently refers to recording the items hauled in order to calculate the tonnage hauled and hence the amount to be billed. He stated that this procedure took approximately an hour per day, that is, assuming that the "slips" for a particular day were received on time. He further stated that until 1968 or 1969, his name was not on the company checks, therefore he had to have plaintiff write a check for everything that had to be paid or purchased in line with the business. When asked how many hours per month plaintiff spent involved in the operations of the company, he indicated in a conjecturing fashion approximately twenty hours per month, but then he finally stated that he "really" did not know.

Mr. Torrance stated that the driver-employees came under the jurisdiction of the United Mine Workers in February 1971 thus the company's billing was changed from tonnage to hourly records, eliminating the necessity for keeping and totalling "slips." He said this means that he now does most of the record keeping. He further cited as examples of differences between what plaintiff did before 1971 and after, the fact that she no longer had anything to do with purchasing equipment, and his practice of now writing some of the checks for the company's bills and necessities. He stated that plaintiff was not required to remain at home in order to provide any services to the company and that she does not stand watch over the trucks parked on her property. He also stated that, in his opinion, the company-related activities of plaintiff had decreased over the years, initially after the settling of his father's estate, then again after the 1971 change-over to a different billing system. He stated that, in his opinion, plaintiff currently works less than fifteen hours a month in connection with company matters, that she only handles the payroll and some billing, and, confusingly, he agreed that these activities amount to four hours per month maximum. He stated that, in his opinion, she only does this in order to have something to do occasionally.

The testimony of the long-time employee of the company, Gilliam King, is of little assistance. He stated that his contacts were with plaintiff's son, that he did not know who handled the responsibilities for billing, etc., that all he was certain of was that plaintiff signed the payroll checks from 1961 to date. He stated repeatedly that he was never at a vantage point which would permit him to testify to the extent of plaintiff's role in the company's operation.

VII

The relevant portions of plaintiff's statement on her August 15, 1972 application for retirement benefits merit citation:

> . . . I own six trucks . . . . These trucks are parked and stored on my property when not in use. I actually have no office. I have a desk and my regular phone is used for this business. . . . My contract renews automatically annually. I had the contract changed in my name when my husband died. I must have rate changes but my son handles the contracts for this.
>
> My services consist of:
>
> I pay all bills and make up checks and pay all men for their services. My son drives a truck, keeps the time for the men, sends billing to the company and types and prepares all the reports. I sign all checks.
>
> I hire an accountant. . . .
>
> My son may make a bank deposit occasionally but most times I make it.

> I have between 6 and 7 full time truck drivers or helpers. Kenneth arranges for repairs and maintenance of the trucks. He makes decisions as to purchase and sale of trucks and equipment. Kenneth's name is on my business checking account and he is permitted to sign checks if I am not available. All men check with either my son or U.S. Steel as to needs of their services. . . . I do not average any more than 4 to 5 hours a week on the business. . . .
>
> My son Kenneth is paid the same wages daily as my other employees. . . . Kenneth assigns all work. I feel he spends 5 to 6 hours weekly in operating my business over and above his regular driving job. Total 48 hours.
>
> Kenneth recommends employees to me and we discuss the workers and I have the final authority of hiring, firing or rejecting.

The court notes that this statement differs substantially from the testimony elicited at the hearing concerning plaintiff's services from the middle, if not the beginning of 1971. Indeed, the court must conclude that substantial confusion surrounds the character of plaintiff's services to the company upon an attempted reconciliation of the hearing testimony and the statements appearing on the various applications and reports which comprise this record.

VIII

Plaintiff's counsel attempts to justify the inconsistencies between the hearing testimony and plaintiff's statements on her applications by suggesting that all the evidence supports the notion that plaintiff gradually withdrew from the operations of the company. For example, counsel urges that the four-to-five hours per week plaintiff cited in her application as time devoted to company business is not inconsistent with the two-to-three hours per week plaintiff testified to at the hearing, precisely because plaintiff gradually withdrew from the company. Unfortunately, counsel's argument does not take into consideration that the statement as to services of four-to-five hours per week was made one year after the time period to which plaintiff ascribed services of only two-to-three hours per week at the hearing.

While this court, following a *de novo* examination of the evidence possibily might have concluded that plaintiff had succeeded in rebutting the presumption set forth in section 205(f)(4)(A) of the Act, 42 U.S.C. §405(f)(4)(A), that a person is engaged in self-employment until he establishes that he rendered no substantial services to any trade or business, it cannot conclude upon the evidence before it that the decision of the Secretary is not supported by substantial evidence.

Accordingly, the Secretary's decision denying plaintiff's claim for social security retirement benefits as determined by the administrative law judge must be affirmed.

Conclusiveness of Earnings Record

SECTION 205(c) (4) (A) (42 U.S.C. 405(c) (4) (A)—CONCLUSIVENESS OF EARNINGS RECORD AFTER EXPIRATION OF TIME LIMITATION —SELF-EMPLOYMENT INCOME

20 CFR 404.804 **SSR 76–32c**

Ascherman v. *Mathews*, USDC, N.D. Ohio, C74–453 (3/30/76)

The claimant, a 75-year-old self-employed attorney, had filed timely income tax returns based on a method which did not yield maximum creditable earnings. After becoming entitled to Social Security benefits, he filed amended tax returns in order to reflect maximum self-employment income which would result in a higher benefit rate. The amended returns covered a 5 year period, three of which were beyond the time limitation and thus barred to correction by section 205(c) of the Social Security Act. *Held*, after the time limitation following any year has expired, subject to very limited exceptions not pertinent here, the Secretary's records of self-employment income derived by an individual during any period of such year shall be conclusive evidence as to the earnings of such individual, in accordance with section 205(c)(4)(A) of the Social Security Act, as amended.

BATTISTI, Chief Judge:

The plaintiff, a 75-year-old, self-employed attorney is seeking to have his record of self-employment earnings for the years 1966, 1967 and 1968, as maintained by the defendant Secretary of Health, Education and Welfare for the purpose of determining Social Security benefits, changed to reflect amendments to his income tax returns for those years which he filed in 1972. In essence, he challenges the Secretary's refusal to increase his monthly Social Security benefits on the basis of his amended reports of earnings. The plaintiff has exhausted the available administrative remedies and invokes the jurisdiction of this court pursuant to 42 U.S.C. § 405(g). The matter comes before the court on the cross motions for summary judgment.

The facts in the case are not in dispute and are set forth in detail in the opinion of the administrative judge. The case presents a single legal question: Do the records of the Secretary constitute conclusive proof as to the earnings of an individual on which Social Security benefits will be determined once the three year, three month and 15 day "time limitation" for amendment set forth in 42 U.S.C. § 405(c)(1)(B) has expired?

The Secretary maintains that once the time limitation has passed in circumstances such as this case, 42 U.S.C. § 405(c)(4)(A)[1] makes his records conclusive on the issue of self-employment income derived by an individual for any particular period. The plaintiff candidly admits that "after considerable research there is little case law to support his position, " but also asserts there is little case law contrary to his position. Accordingly, the plaintiff argues the facts. He points out that for the years in question his original report of self-employment income was based on a method of reporting which he was advised to follow by an Internal Revenue Service Agent. It is clear that this method resulted in less than the maximum self-

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[1] Prior to the expiration of the time limitation following any year the Secretary may, if it is brought to his attention that any entry of wages or self-employment income in his records for such year is erroneous or that any item of wages or self-employment income for such year has been omitted from such records, correct such entry or include such omitted item in his records, as the case may be. After the expiration of the time limitation following any year—

(A) the Secretary's record (with changes, if any, made pursuant to paragraph (5) of this subsection) of the amounts of wages paid to, and self-employment income derived by, an individual during any period in such year shall be conclusive for the purposes of this subchapter;

employment income being credited to his Social Security earnings record. He claims that until 1972 he was not aware of his right to report his income in the fashion which he ultimately used in the amended returns with the resulting higher self-employment income figure. At that time he indicates that he was advised to file amended returns by a Social Security employee in the Cleveland area. He did so for the years 1966 through 1970[2] and I.R.S. accepted the additional Social Security tax proffered for all of these years.[3] In the face of clear statutory language against his position, the plaintiff argues that "justice, equity and fairness" should prohibit one government agency from accepting and retaining his money, while another government agency denies him the benefits he anticipated receiving in return.

Were this matter not plainly governed by a statutory provision, the plaintiff's equitable argument would have much appeal. However, Congress has acted with regard to this problem is a rational manner which it deemed necessary to the efficient administration of the Social Security system. It is unfortunate that the plaintiff's benefits are somewhat less than they might have been, but as one court noted when faced with a similar appeal:

> [T]he immensity of the problem of providing Social Security "called forth a highly complex and interrelated statutory structure." The mandate to the Secretary in 42 U.S.C. §405(c)(2) to maintain HEW records of self-employment income was necessary for the determination in an orderly manner of the innumerable requests for insurance benefits. Congress recognized that a beginning and end of time for establishing eligibility was an essential part of that need by prescribing a "time limitation" within which changes and revisions in the Secretary's records might be made. . . . One need only be reasonable to foresee the disaster in HEW if there were not a reasonable time limitation for ending disputes about eligibility benefits. This being so, the question is only whether the 3 year, 3 month, 15 day period is reasonable in relation to the purposes of the Act.

Lasch v. *Richardson*, 457 F.2d 435, 440 (7th Cir. 1972). (Citation omitted)

Further, it is significant to note that the plaintiff's filing of amended returns and payment of additional tax were self-initiated and voluntary acts. The plaintiff is an attorney and was advised by an accountant. Both individuals had constructive notice of the time limitation when the amended returns were filed. Viewed in this light, plaintiff's predicament is seen as not wholly the product of two government bureaucracies at cross purposes.

There being no genuine issue as to any material fact, summary judgment is appropriate in this case. The court holds that the Secretary's reliance on 42 U.S.C. § 405(c)(4)(A) is well founded and orders judgment affirming the Secretary's decision.

IT IS SO ORDERED.

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[2] Since the amended returns for 1969 and 1970 were filed within the applicable time limitation, the plaintiff's earnings record for those years has been corrected and there is no cause for dispute.

[3] The following are the additional amounts paid by the plaintiff with the filing of the amended returns for each year.

1966: $126.13
1967: $164.40
1968: $414.20

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Deductions

SECTIONS 203(b) and (f) and 209 (42 U.S.C. 403(b) and (f) and 409)—DEDUCTIONS—EXCLUSION OF TRAVELING OR OTHER EXPENSES FROM WAGES—OUTSIDE SALESMEN

20 CFR 404.1026(a)(8) SSR 76–33

The claimant performed services as an outside salesman for his employer who treats all salesmen as employees and does not allow for any business expenses. The claimant contends his expenses should be deducted from his wages before deductions are applied against his Retirement Insurance benefit. *Held,* Social Security Regulations, 20 CFR section 404.1026(a)(8) permit exclusion of travel and other expenses from wages only where identified specifically as such by the employer; since the employer did not specifically designate amounts for expenses in salary payments made to claimant, all remuneration received by him constitutes wages for deduction purposes.

The claimant filed an application for retirement insurance benefits on March 11, 1969, showing his date of birth as February 21, 1907, and indicated that he was employed by the "E" Foods Corporation and had not been self-employed in either 1969, 1968, or 1967. He stated that he had had total earnings of $8,830.57 in 1968 and had earned more than the exempt amount in each month of that year, but expected to earn under $1,680 in 1969 since he would be working part time only in 1969. He agreed to file annual reports of earnings when required. His entitlement was established. Thereafter claimant indicated that his earnings would also preclude payment for 1969, and that he desired no payment for that year. His employer advised the Social Security Administration by letter of January 31, 1971, that (1) the claimant had been an outside salesman with them during 1970; (2) the employer does not allow for any business expenses, i.e., no meals, car expense or any other expense in connection with selling activities; and (3) the claimant's salary is entirely on a commission basis.

The claimant filed an annual report for 1970 showing his total wages earned as $3,560.81 with earnings in excess of the exempt monthly amount in all months except April, November, and December. He showed his 1971 earnings (wages) as $1,772.56 with all months indicated as work months. (These earnings are posted to his earnings record.) The claimant indicated that he earned less than the yearly exempt amount in 1972.

Pertinently, the E Foods Corporation indicated that many years ago the company opted to treat its approximately 10,000 sales representatives such as claimant, as "employees," witholding Federal income taxes, and making payments under the FICA and Unemployment Tax Act. The company gives its sales representatives training in the use of its equipment and the methods of door-to-door selling. The company could change the methods used by its salespeople in doing the work. The corporation gives its salespeople further training, both in the office and on the job, whenever new methods appear necessary. The salespeople work under the firm's name, do not advertise or maintain business listings, and do not hold themselves out to the public as available to do this or similar work. The information provided supports a finding of employer-employee status.

Remuneration shown by the employer as that earned by claimant in 1972, 1973, and 1974 through October 31, 1974, was $1,335.17, $1,699.20 (supported by the wage and tax statement from this employer submitted by claimant), and $2,041.33, respectively. Another wage and tax statement for 1973 (the pertinent year) claimant submitted shows that he was also paid $1,037.89 by another employer. At the hearing, claimant said that in 1974 he had been paid commissions of $2,208.21 by the E Foods Corporation and had been paid wages of $828.12 by another employer. He said his gas expenses alone had approximated $900 per year, and that he, of course, had other business expenses.

While claimant no longer contends that he was self-employed, but was an employee of E, and does not dispute that he earned over the exempt yearly amount in pertinent years of entitlement, he believes that it is inequitable to include his expenses of operating (selling) for this employer when figuring his earnings for deduction purposes.

Section 202(a) of the Social Security Act, as amended, 42 U.S.C. § 402(a), provides that every fully insured individual who has attained the age of 62 and who has filed application for old-age insurance benefits shall be entitled to an old-age insurance benefit for each month in which he is so entitled. Section 203 of the Act, 42 U.S.C. § 403, however, provides in pertinent part:

> "(b) Deductions, * * * shall be made from any payment or payments under this title * * * on the basis of such individual's wages and self-employment income, * * * if for such month he (claimant) is charged with excess earnings, under the provisions of subsection (f) of this section, * * *
>
> "(f) For purposes of subsection (b)—
>
> "(3) * * * (A)n individual's excess earnings for a taxable year shall be 50 percent of his earnings for such year in excess of the product of $175[1] * * * multiplied by the number of months in such year. * * *
>
> "(5)(A) An individual's earnings for a taxable year shall be (i) the sum of his wages for services rendered in such year and his net earnings from self-employment for such year. * * *

"The term 'wages' for social security purposes is defined by section 209 of the Act, 42 U.S.C. § 409, as '. . . remuneration paid after 1950 for employment, including the cash value of all remuneration paid in any medium other than cash . . ." While section 209 also provides for various statutory exclusions from wages, none are relevant in this case.

With particular regard to the exclusion of business expenses from wages for services rendered, however, Social Security Administration Regulations

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[1] $200 for 1974; $210 for 1975; $230 for 1976.

No. 4, section 1026(a) (8) provides that:

> "Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. *Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.*" (Emphasis supplied.)

The record in this case indicates that, during the relevant period, claimant was an outside salesman with E Foods, a company that did not and does not allow for any business expenses, e.g., meals, car expenses or any other expenses in connection with the selling activities of its employee sales representatives. Claimant's salary was entirely on a commission basis. While claimant believes that expenses he incurred in connection with his employment should be deducted from his gross wages for social security work deduction purposes, the above cited section of Social Security Administration Regulations and the facts in this case do not permit such a conclusion.

Therefore, it is held that under the applicable law and regulations, the total remuneration received by claimant from his employers constituted "wages," and must be considered for purposes of determining the amount of claimant's excess earnings for deduction purposes under section 203 of the Social Security Act.

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Judicial Review

SECTION 205(g) (42 USC 405(g))—JUDICIAL REVIEW—REFERRAL OF SOCIAL SECURITY BENEFIT CASES TO UNITED STATES MAGISTRATES

20 CFR 404.951 **SSR 76–14c**

MATHEWS v. WEBER, U.S. Supreme Court, No. 96 S. Ct. 549 (1/14/76)

> **Under Section 205(g) of the Social Security Act, as amended, a district court can review a final decision of the Secretary of Health, Education, and Welfare upon request of any party to a claim for social security benefits after such party has exhausted his administrative remedies. Federal district courts have referred social security cases to a Magistrate to "prepare a proposed written order or decision, together with proposed findings of fact and conclusions of law where necessary or appropriate" for consideration by the District Judge after the Magistrate had reviewed the record, and heard the parties' arguments. The District Court Judge retains the authority and responsibility to make the final decision in any case. The Secretary contended the referral violated Rule 53(b) of the Federal Rules of Civil Procedure and was not authorized by the Federal Magistrates Act, 28 U.S.C. 636. *Held*, the referral of social security benefit cases to U.S. Magistrates does not violate rule 53(b).**

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented in this case is whether the Federal Magistrates Act of 1968, 28 U.S.C. § 636, permits a United States District Court to refer all Social Security benefit cases to United States Magistrates for preliminary review of the administrative record, oral argument, and preparation of a recommended decision as to whether the record contains substantial evidence to support the administrative determination—all subject to an independent decision, on the record, by the District Judge who may, in his discretion, hear the matter *de novo*.

(1)

Respondent Weber brought this action in the United States District Court for the Central District of California to challenge the final determination of the Secretary of Health, Education, and Welfare that he was not entitled to reimbursement under the Medicare provisions of the Social Security Act, 42 U.S.C. § 1395 *et seq.*, for medical payments he made on behalf of his wife. Such a suit for administrative review is authorized by § 205 (g) of the Act, 42 U.S.C. § 405 (g), and governed by its standards. The court may consider only the pleadings and administrative record, and must accept the Secretary's findings of fact so long as they are supported by substantial evidence.

When respondent's complaint was filed, the Clerk of Court pursuant to court rule assigned the case to a named District Judge, and simultaneously referred it to a United States Magistrate with directions "to notice and conduct such factual hearings and legal argument as may be appropriate" and to "prepare a proposed written order or decision, together with proposed findings of fact and conclusions of law where necessary or appropriate" for consideration by the District Judge. The Clerk took these steps pursuant to General Order No. 104–D of the District Court, which requires initial reference to a Magistrate in seven categories of administrative review cases,[1] including actions filed under 42 U.S.C. § 405 (g). The parties may object to the Magistrate's recommendations. After acting on any objections the Magistrate is to forward the entire file to the District Judge to whom the case is assigned for decision; the District Judge "will calendar the matter for oral argument if he deems it necessary or appropriate."

The Secretary moved to vacate the order of reference, arguing (1) that referral under a general order of this type violated Rule 53 (b) of the Federal Rules of Civil Procedure and (2) that such referral was not authorized by the Federal Magistrates Act. The Secretary also argued that the reference was of doubtful constitutionality and in contravention of the judicial review provisions of the Social Security Act, arguments that he has expressly declined to make in this Court. The District Court refused to vacate the order of reference, but certified the reference question for appeal under 28 U.S.C. § 1292 (b).

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[1] General Order No. 104–D provides for reference in the following types of administrative review:

"(A) Actions to review administrative determinations re entitlement to benefits under the Social Security Act and related statutes, including but not limited to actions filed under 42 U.S.C. § 405 (g).

"(B) Actions filed by the United States or a carrier to review, implement or restrain orders of the Interstate Commerce Commission re freight overcharges, including but not limited to actions under 28 U.S.C. § 1336 and 49 U.S.C. § 304a.

"(C) Actions, whether in the form of judicial review, habeas corpus or otherwise, for review of orders and other actions of the Immigration and Naturalization Service. Included, but not by way of limitation, are actions involving deportation orders, denial of preference classification visas and denial of petitions to adjust status.

"(D) Actions for review of adjudications by the Civil Service Commission, or the various departments or agencies, involving personnel actions such as wrongful discharge, reductions in force, transfers, retirements, etc.

"(E) Actions for review of an order of any branch or establishment of the military service denying discharge of petitioner from the military, whether such actions are brought in the form of petitions for judicial review, habeas corpus or actions for declaratory relief or injunction.

"(F) Actions filed pursuant to 18 U.S.C. § 923 (f) (3) to review administrative decisions denying applications for licenses to engage in business as a firearms or ammunition importer, manufacturer or dealer.

"(G) Actions to review administrative decisions by the Department of Labor denying applications for alien employment certification required pursuant to the provisions of 8 U.S.C. § 1182 (a) (14)."

The petition for certiorari raises only the issue of the propriety of the part of subsection (A) of the General Order that authorizes reference of cases brought under 42 U.S.C. § 405 (g), and we intimate no opinion on the validity of its other provisions.

The Court of Appeals affirmed. *Weber* v. *Secretary of Health, Education, and Welfare*, 503 F. 2d 1049 (CA9 1974). That court stressed the limited and preliminary nature of the inquiry in review actions brought under 42 U.S.C. § 405 (g), the limited scope of the Magistrate's role on reference, and the fact that final authority for decision remained with the District Judge. "Were the broad provisions of General Order No. 104–D . . . before us, the Secretary might have grounds to complain. As applied, the rule is not vulnerable to the attack here mounted." 503 F. 2d, at 1051. The Court of Appeals thus reached a decision squarely in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Ingram* v. *Richardson*, 471 F. 2d 1268 (CA6 1972). We granted certiorari[2] and we affirm.

(2)

After several years of study, the Congress in 1968 enacted the Federal Magistrates Act, 28 U.S.C. § 631 *et seq.* The Act abolished the office of United States Commissioner, and sought to "reform the first echelon of the Federal judiciary into an effective component of a modern scheme of justice by establishing a system of U.S. Magistrates." S. Rep. No. 371, 90th Cong., 1st Sess., p. 8 (1967) (hereafter Senate Report). In order to improve the former system and to attract the most competent men and women to the office, the Act in essence made the position analogous to the career service, replacing the fee system of compensation with substantial salaries; the Act also gave both full and part-time magistrates a definite term of office, and required that wherever possible the district courts appoint only members of the bar to serve as magistrates. Magistrates took over most of the duties of the Commissioners, and the Act gave them new authority to try a broad range of misdemeanors with the consent of the parties.

Section 636(b) of the Act outlines a procedure by which the district courts may call upon magistrates to perform other functions, in both civil and criminal cases. It provides:

> "Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to—
>
> "(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;
>
> "(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and
>
> "(3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing."

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[2] Because respondent has declined to appear, we invited an *amicus curiae* to support the decision of the Court of Appeals. 420 U. S. 989.

The three examples § 636 (b) sets out are, as the statute itself states, not exclusive. The Senate sponsor of the legislation, Senator Tydings, testified in the House hearings:

> "The Magistrates Act specifies these three areas because they came up in our hearings and we thought they were areas in which the district courts might be able to benefit from the magistrate's services. We did not limit the courts to the areas mentioned. Nor did we require that they use the magistrates for additional functions at all.
>
> "We hope and think that innovative, imaginative judges who want to clean up their caseload backlog will utilize the U.S. magistrates in these areas and perhaps even come up with new areas to increase the efficiency of their courts." Hearings on the Federal Magistrates Act before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 2d Sess., p. 81 (1968) (hereafter House Hearings).

See also Hearings on the Federal Magistrates Act, before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., pp. 14, 27 (1967) (hereafter Senate Hearings).

Section 636 (b) was included to "permit . . . the U.S. district courts to assign magistrates, as officers of the court, a variety of functions . . . presently performable only by the judges themselves." Senate Report, p. 12. In enacting this section and in expanding the criminal jurisdiction conferred upon magistrates, Congress hoped by "increasing the scope of the responsibilities that can be discharged by that office, to establish a system capable of increasing the overall efficiency of the Federal judiciary. . . ." Senate Report, p. 11.

The Act grew from Congress' recognition that a multitude of new statutes and regulations had created an avalanche of additional work for the district courts which could be performed only by multiplying the number of judges or giving judges additional assistance. The Secretary argues that Congress intended the transfer to magistrates of simply the irksome, ministerial tasks; respondent urges that Congress intended magistrates to take on a whole range of substantive judicial duties and advisory functions. We need not accept the characterization of the Federal Magistrate as either a "parajudge," as respondent would have it, or a "supernotary," as the Secretary argues, in order to resolve this case; finding the best analogy to this new office is not particularly important. Congress had a number of precedents for this new officer before it: British masters, justices of peace, and magistrates; our own traditional special masters in equity; and pretrial examiners.[3] The office Congress created drew on all prior experience. What is important is that the congressional anticipation is becoming a reality; in fiscal 1975, for example, the 500 full or part-time U.S. magistrates disposed of 255,061 matters, most of which would otherwise have occupied a district judge. These included 36,766 civil proceedings, 537 of which were social security review cases. Annual Report of the Director, Administrative Office of the United States Courts VIII–4 (1975). See also Sussman, The

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[3] The administration of the Act also profits from the British analogy. See Institute of Judicial Administration, Report of the Committee to Study the Role of Masters in the English Judicial System (Federal Judicial Center, 1974).

Fourth Tier in the Federal Judicial System: The United States Magistrate, 56 Chicago Bar Record 134 (1974); Geffen, Practice Before the United States Magistrate, 47 Los Angeles Bar Bulletin 462 (1972); Doyle, Implementing the Federal Magistrates Act, 39 J. Kansas B. A. 25 (1970).

Congress manifested concern as well as enthusiasm, however, in considering the Act. Several witnesses, including the Director of the Administrative Office and representatives of the Justice Department, expressed some fear that Congress might improperly delegate to magistrates duties reserved by the Constitution to Article III judges. Senate Hearings, 107–128, 241n; House Hearings, 123–128.[4] The hearings and committee reports indicate that in § 646 (b) Congress met this problem in two ways. First, Congress restricted the range of matters that may be referred to a magistrate to those where referral is "not inconsistent with the Constitution and laws of the United States. . . ." Second, Congress limited the magistrate's role in cases referred to him under § 636 (b). The Act's sponsors made it quite clear that the magistrate acts "under the supervision of the district judges" when he accepts a referral, and that authority for making final decisions remains at all times with the district judge. Senate Report, p. 12. "[A] district judge would retain ultimate responsibility for decision making in every instance in which a magistrate might exercise additional duties jurisdiction." House Hearings, Testimony of Senator Tydings, p. 73. See also House Hearings, Testimony of Assistant Deputy Attorney General Finley, p. 127.

(3)

We need not define the full reach of a magistrate's authority under the Act, or reach the broad provisions of General Order No. 104–D, in order to decide this case. Under the part of the order at issue the magistrates perform a limited function which falls well within the range of duties Congress empowered the district courts to assign to them. The magistrate is directed to conduct a preliminary review of a closed administrative record—closed because under § 205 (g) of the Social Security Act, 42 U.S.C. § 405 (g), neither party may put any additional evidence before the District Court. The magistrate gives only a recommendation to the judge, and only on the single, narrow issue: is there in the record substantial evidence to support the Secretary's decision?[5] The magistrate may do no more than propose a recommendation, and neither the statute nor the General Order gives such recommendation presumptive weight. The district judge is free to follow it or wholly to ignore it, or, if he is not satisfied, he may conduct the review in whole or in part anew. The authority—and the responsibility—to make an informed, final determination, we emphasize, remains with the judge.

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[4] Some courts have manifested a like concern. See *T. P. O. Inc.* v. *McMillen*, 460 F. 2d 348 (CA7 1972); *Reed* v. *Board of Election Commissioners*, 459 F. 2d 121 (CA1 1972). But cf. *Palmore* v. *United States*, 411 U. S. 389 (1973). See also Note, Masters and Magistrates in the Federal Courts, 88 Harv. L. Rev. 779 (1975); Comment, An Adjudicative Role for Federal Magistrates in Civil Cases, 40 U. Chi. L. Rev. 584 (1973). Because we limit our consideration of the Act and General Order No. 104–D to the particular reference presented by this case, we need not deal with these broad constitutional issues. Petitioner expressly declines to rely on any constitutional argument.

[5] Ordinarily, the parties will agree as to the legal standard, leaving as the sole issue whether the Secretary's determination is supported by substantial evidence. In some cases, the magistrate may preliminarily resolve issues of law before making a recommendation; in some few cases, the recommendation may turn wholly upon an issue of law. The parties have not suggested that case in either of these sub-categories raise issues of statutory interpretation that require separate treatment, and we do not reach them on this record. Experience with the magistrate's role under this Act may well lead to the conclusion that sound judicial administration calls for sending directly to the District Judge those cases that turn solely upon issues of law.

The magistrate's limited role in this type of case nonetheless substantially assists the district judge in the performance of his judicial function, and benefits both him and the parties. A magistrate's review helps focus the Court's attention on the relevant portions of what may be a voluminous record, from a point of view as neutral as that of an Article III judge. Review also helps the Court move directly to those legal arguments made by the parties that find some support in the record. Finally, the magistrate's report puts before the district judge a preliminary evaluation of the cumulative effect of the evidence in the record, to which the parties may address argument, and in this way narrows the dispute. Each step of the process takes place with the full participation of the parties. They know precisely what recommendations the judge is receiving and may frame their arguments accordingly.

We conclude that in the context of this case the preliminary review function assigned to the magistrate, and at issue here, is one of the "additional duties" that the statute contemplates magistrates are to perform.[6]

(4)

The Secretary argues that the magistrate, in taking this reference, functions as a special master. From this premise, the Secretary asks us to hold that a general rule requiring automatic reference in a category of cases does not comply with the mandate of Fed. Rule Civ. Proc. 53, that "reference to a master shall be the exception and not the rule," made in nonjury cases "only upon a showing that some exceptional condition requires it." He also argues that, for similar reasons, the reference here is not permissible under our decision in *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249

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[6] Though we do not rely upon subsequently expressed congressional views, the Congress plainly considers claims such as respondent brought in the District Court as matters that could appropriately be referred for preliminary review to a magistrate. In considering magistrates' salaries in 1972, a Senate subcommittee noted:

"Magistrates are judicial officers of the Federal district courts . . . . They may also be authorized to screen prisoner petitions, hold pretrial conferences in civil and criminal cases, hear certain preliminary motions, *review social security appeals*, review Narcotics Addict Rehabilitation Act matters, and serve as special masters. In short, they render valuable assistance to the judges of the district courts, thereby freeing the time of those judges for the actual trial of cases." S. Rep. No. 1065, 92d Cong., 2d Sess., p. 3 (1972) (emphasis added).

The Administrative Office of the U. S. Courts, the statutory body that supervises the administrative aspects of the Act pursuant to 28 U.S.C. § 604 (d)(1), reads the Act in the same way. It has distributed a "checklist" of magistrate duties that includes review of Social Security appeals brought under 42 U.S.C. § 405 (g). Judicial Conference of the United States, Committee on the Administration of the Federal Magistrate System, Duties Which Might Be Assigned to U.S. Magistrates (March 14, 1975). The Administrative Office first noted in its 1972 report that district courts were assigning Social Security Appeals to magistrates under the 1968 Act. Administrative Office of the U. S. Courts, Annual Report of the Director (1972) 250.

(1957).[7]

Section 636 (b) expressly provides that a district court may, in an appropriate case and in accordance with Fed. Rule Civ. Proc. 53, call upon a magistrate to act as a special master. But the statute also is clear that not every reference, for whatever purpose, is to be characterized as a reference to a special master. It treats references to the magistrate acting as master quite separately in subsection (1), indicating by its structure that other references are of a different sort. Moreover, Rule 53 (e) provides that, in nonjury cases referred to a master, the court shall accept any finding of fact that is not clearly erroneous. Under the reference in this case, however, the judge remains free to give the magistrate's recommendation whatever weight the judge decides it merits. It cannot be said, therefore, that the magistrate acts as a special master in the sense that either Rule 53 or the Federal Magistrates Act uses that term. The order of reference at issue does not constitute the magistrate a special master.

The Secretary argues that the magistrate will be a master-in-fact because the judge will accept automatically the recommendation made in every case. Nothing in the record or within the scope of permissible judicial notice supports this argument; nor does common observation of the performance of United States judges remotely lend the slightest credence to such an extravagant assertion. We express no opinion with respect to either the wisdom or the validity of automatic referral in other types of cases; only the narrow portion of General Order No. 104–D that led to reference of this particular case is before us today. In this narrow range of cases, reference promotes more focused, and so more careful, decisionmaking by the district judge. We categorically reject the suggestion that judges will accept, uncritically, recommendations of magistrates.

Our decision in *LaBuy* v. *Howes Leather Co.*, 352 U. S. 249 (1957), does not call for a different result. In *LaBuy*, the district judge on his own motion referred to a special master two complex, protracted antitrust cases on the eve of trial. The cases had been pending before him for several years, he had heard pretrial motions, and he was familiar with the issues involved. The master, a member of the bar, was to hear and decide the entire case, subject to review by the district judge under the "clearly erroneous" test. The judge cited the problems attendant to docket congestion to satisfy Rule 53's requirement that a reference to a special master be justified by "exceptional circumstances." The Court held that on these facts reference was not permissible and affirmed the Court of Appeals' supervisory prohibition.

LaBuy, although nearly two decades past, is the most recent of our cases dealing with special masters, and our decision today does not erode it.[8] The magistrate here acted in his capacity as magistrate, not as a special master, under a reference authorized by an Act passed 10 years after *LaBuy* was decided. Other factors distinguish this case from *LaBuy* as well. The issues here are as simple as they were complex in *LaBuy*, and the District Judge had not yet invested any time in familiarizing himself with the case. The reference in this case will result in a recommendation that carries only such weight as its merit commands and the sound discretion of the judge warrants. We are persuaded that the important premises from which the *LaBuy* decision proceeded are not threatened here.

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[7] These arguments persuaded the Court of Appeals in *Ingram* v. *Richardson*, 471 F. 2d 1268 (CA6 1972). Other federal courts to consider the issue reached a contrary result. *Yascavage* v. *Weinberger*, 379 F. Supp. 1297 (MD Pa. 1974); *Bell* v. *Weinberger*, 378 F. Supp. 198 (ND Ga. 1974); *Murphy* v. *Weinberger*, Unempl. Ins. Rep. ¶ 17,608 (Conn. 1974).

Several courts have relied upon these arguments to one extent or another in disapproving references that involved a broader grant of authority to the magistrate. See, *e. g.*, *Flowers* v. *Crouch-Walker Corp.*, 507 F. 2d 1378 (CA7 1974); *T. P. O., Inc.* v. *McMillen*, 460 F. 2d 348 (CA7 1972); *Reed* v. *Board of Election Comm'rs*, 459 F. 2d 124 (CA1 1972).

Finally, our decision in *Wingo* v. *Wedding*, 418 U. S. 461 (1974), does not bear on this case. The Secretary has abandoned any claim that the statute giving the District Court jurisdiction of the case in the first instance, 42 U.S.C. § 405 (g), precludes reference to a magistrate. It was the Court's reading of the habeas corpus statute, 28 U. S. C. § 2243, that formed the basis for the holding in *Wingo* v. *Wedding*.

Affirmed.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

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[8] See generally Kaufman, Masters in the Federal Courts: Rule 53, 58 Col. L. Rev. 452 (1958); *C. A. B.* v. *Carefree Travel, Inc.*, 513 F. 2d 375 (CA2 1975).

STATE AND LOCAL COVERAGE

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Commissioner's Ruling on State's Request for Review

New Mexico—University of New Mexico—Wages 62

Commissioner's Ruling

SECTIONS 209(b) and 218(i) and (t) (42 U.S.C. 409(b) and 418(i) and (t))—STATE AND LOCAL COVERAGE—NEW MEXICO—UNIVERSITY OF NEW MEXICO—WAGES

20 CFR 404.1026(a), 404.1027(b) and 404.1275 SSR 76-22c

STATE OF NEW MEXICO v. WEINBERGER, 517 Fed. 2nd 989 (10th Cir. 1975), cert. denied 423 U.S. 1051 (1976)

> **Pursuant to section 218 of the Social Security Act, the Secretary, HEW, affirmed an assessment made against the State of New Mexico for contributions due on the basis that payments made by the University of New Mexico to employees absent on sick leave were not payments on account of sickness but continuations of salary. Such payments are not excludable as wages under section 209(b) of the Act. The Court of Appeals, in holding the Secretary's decision not unreasonable, *Held* that the Secretary has authority to interpret the meaning of "wages" within the state and local employment sector. Where identical treatment to that given in the private employment sector is not practicable, his interpretation may differ with that rendered by the Internal Revenue Service, pursuant to its regulations, regarding similar payments made to private employees.**

BARRETT, CIRCUIT JUDGE:

After duly exhausting all available administrative remedies, the State of New Mexico (State) commenced this action in the district court pursuant to 42 U.S.C. §418(t) seeking a redetermination of the correctness of an assessment made by the Commissioner of Social Security, a delegate of the defendant, against the Regents of the University of New Mexico, in respect to Social Security contributions allegedly due and owing upon certain payments made by the University to an employee under its established sick leave plan. This appeal follows the Trial Court's entry of Summary Judgment in favor of the Secretary of Health, Education and Welfare (Secretary).

The facts are not in dispute. In accordance with 42 U.S.C. §418 and §§5-7-1, *et seq.*, N. M. S. A., 1953 Comp., the parties entered into an agreement for coverage of employees of the State and its political subdivisions, including the University of New Mexico, under the Social Security Act. The University entered into an agreement with the Public Employees Retirement Board, effective January 1, 1955. Since 1949, the University has had in effect a "plan" or system for determining payments to its employees who are absent from work because of sickness or accident disability. The amount of payments to each employee under the plan are recorded and separately stated on the University's books and records as "sick pay" and are made from a regular salary account.

During 1968, Mr. Galloway, a University employee, was absent from work because of illness. As a non-exempt employee of several years' standing, he had earned under the Plan sufficient sick leave to cover the period of his illness and the University paid him $324.97 as sick leave payments. That amount was computed under the applicable sick leave policy as his regular straight-time rate of pay times the number of hours for which he qualified for sick leave under the policy. Mr. Galloway's hours of sick leave were duly posted to the "payroll time report" and the amount paid as sick leave was reflected on the related "payroll register."

The University did not make a Social Security contribution with respect to these payments on the grounds that such payments were excluded from "wages" under 42 U.S.C. §409(b). The Social Security Administration thereafter assessed $28.60 in respect to these payments made to Galloway.

On appeal the sole issue is whether the trial court erred in relying upon an unauthorized and improper interpretation made by the Secretary that the above payments did not qualify to be excluded from "wages" under 42 U.S.C. §409(b).

The Social Security Act, at least insofar as it applies to *private* employers and their employees, is administered by the Internal Revenue Service (collecting funds from employers and employees) and the Department of Health, Education and Welfare (paying benefits). Both the rate of tax to be paid, and the rate of benefit to be received are keyed to "wages" earned by the employee. The term "wages" used in this computation is defined under both the "IRS statutes" (26 U.S.C. §3121) and under the "HEW statutes" (42 U.S.C. §409). Both statutes provide that "wages" shall not include "payments made to an employee under a plan on account of sickness." [1]

While State employees are not covered by the Federal Insurance Contributions Act,[2] 26 U.S.C. §3101 *et seq.*, the States are permitted to contract with HEW to establish analogous programs under 42 U.S.C. §418. Of importance to the instant dispute, 42 U.S.C. §418(e)(1) provides:

> (e)(1) Each agreement under this section shall provide—
>
> (A) that the State will pay to the Sectetary of the Treasury, at such time or times as the Secretary of Health, Education, and Welfare may by regulations prescribe, *amounts equivalent to the sum of taxes which would be imposed* by sections [3101 and 3111 of Title 26 I. R. C. of 1954] if the services of employees covered by the agreement constituted employment as defined in Section [3121 of Title 26, I. R. C. of 1954]; and
>
> (B) that the State will comply with such *regulations relating to payments*

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[1] 26 U.S.C. §3121(a)(2)(B) provides, inter alia:

(a) Wages—For purposes of this chapter the term "wages" means all remuneration for employment . . . .: except that such term shall not include—

(2) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally . . . on account of—

(B) Sickness or accident disability . . . .

42 U.S.C. §409(b) is substantially the same.

[2] Employment by a State is excluded from the definition of "employment" by 26 U.S.C. §3121(b)(7).

> *and reports as the Secretary of Health, Education and Welfare may prescribe* to carry out the purposes of this section. (Emphasis added).

42 U.S.C. §418(i) further provides:

> (i) Regulations of the Secretary [HEW] to carry out the purposes of this section *shall be designed to make the requirements imposed on States pursuant to this section the same, so far as practicable, as those imposed on employers* pursuant to this subchapter and [by Sections 3101 *et seq.*, 6651(a) and 3504 of Title 26, I. R. C. of 1954]. (Emphasis added).

The instant controversy arises from the fact that in assessing contributions to be paid in by private employers the Commissioner of Internal Revenue has construed the "sick pay" exclusion from "Wages" differently than has the Secretary of HEW in assessing public employers.[3]

It is not disputed that the payment made here was made pursuant to a "plan or scheme," and hence if the interpretation issued by the Commissioner of Internal Revenue, *supra*, is controlling, the HEW assessment must be reversed.

In summary, the State contends that the above interpretation made by the Social Security Administration is both irrelevant and unauthorized; that while "wages" are defined under both §§3121 and 409, the latter definition is *relevant only for the purpose of determining entitlement to benefits* under §401; that it is made clear by 42 U.S.C. §418e(1)(A) that an employer's liability for contributions (either a private or *public* employer) is to be determined solely under §3121 of the I. R. C.; that the Secretary of HEW is not authorized to issue rulings under I. R. C. §3121 and has, in fact, been directed under 42 U.S.C. §418(i) to conform his regulations—as to the requirements to be placed on the States—to those of the Commissioner of Internal Revenue; and that to sustain the Secretary's interpretation would be to allow inconsistent tax policies to co-exist, discriminating between private and public employees when Congress clearly intended them to be treated equally and uniformly.

The Secretary would seem to concede that because of the reciprocal responsibilities ascribed the IRS and the HEW in the case of *private* employers (i.e., that the two services are working on opposite sides of the same coin in collecting taxes and paying benefits) that it would be contrary to the spirit of the Act for those agencies to have interpretations of the term "wages" which differed significantly. *Amidon v. Flemming*, 285 F.2d 718 (1st Cir. 1960).

Unlike the bifurcated system in respect to private employers, however, the Secretary maintains that as to *public* employers, HEW is the *sole* administrator of the Act. Hence, while payments by the State under a

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[3] Rev. Rul. 65–275(1965) simply held that payments for earned sick leave made to an employee for periods of absence from work on account of illness *pursuant to a plan or system* of the type described in §3121(a)(2) of the F.I.C.A. are excluded from "wages" and are not subject to the taxes imposed under that Act.

SSR 72–56 (1972), on the other hand, held that even if there exists an established sick leave plan, payments under such a plan by a State employer would be treated as "wages" under the Social Security Act unless it is shown in *addition* that the State has statutory or other legal authorization to make payments to employees *solely on account of sickness* (as distinguished from authorization to merely *continue salary* payments during periods of absence due to illness.)

§418 plan are to be made at an "equivalent" *rate* to the taxes imposed on private employers under §3121 this does not necessarily mean that HEW is bound by the definition of "wages" established in the private employment sector, nor that the IRS is the only agency empowered to interpret such term. HEW is the agency which assesses the States for payments due [§418(q)]. It is, furthermore, the agency possessing the experience and expertise in administering the statute. Its interpretation, according to the Secretary, should therefore be accorded due weight.

In further support of the contention that HEW is authorized to make the contested interpretation, the Secretary contends that: (a) the language of §418(a) indicates that the definition of "wages" under §409 does not exist merely for purposes of computing benefits to be paid; (b) that the legislative history of the 1958 amendment to §409(i) indicates that Congress viewed the definitions of Sections 409 and 410 as being applicable in computing *payments due* under §418(e), citing *State of Montana v. United States*, 489 F.2d 522 (9th Cir. 1973); and (c) that this 1958 amendment implicitly recognized the practice of HEW of including as "wages", continuation of salary during a State employee's absence from work because of sickness, citing *Graves v. Gardner*, 280 F.Supp. 666 (S.D.N.Y. 1968).

While we have been presented no cases directly in point with the challenge presented here, we think that under the Social Security Act the Secretary has been given the authority, albeit limited, to interpret "wages" in respect to contributions to be made by public employers. In addition to the arguments made by the Secretary in his brief, we find support for this conclusion in 42 U.S.C. §418(i). As noted, *supra*, that section, entitled "Regulations" provides that any regulations made by the Secretary to "carry out the purposes" of Section 418 shall be designed to "make the requirements imposed on States . . . the same, *so far as practicable*, as those imposed on [private] employers . . ." It would seem clear from this language that where it is not "practicable," the Secretary may issue regulations as to the requirements to be placed upon the States which are not "the same" as those placed on private employers, i.e., the limitation here implies the power.

Having found the existence of authority in the Secretary, in limited situations, to make interpretations which may result in private and public employers not being treated the "same" insofar as their liability for contributions [is] concerned, we cannot hold, under the circumstances of this case, that the Secretary's decision that this was an instance where it was not "practicable" to conform his Regulation to those promulgated under §3121, or to interpret wages differently for public employers, was not reasonable. *Udall v. Tallman*, 380 U.S. 1 (1965); *Gardner v. Brian*, 369 F.2d 443 (10th Cir. 1966).

The Secretary's "variant" interpretation was here predicated apparently upon a literal interpretation given to §409(b), i.e., that to be excluded from "wages", sick leave payments must be paid solely *on account of sickness*. Such payments by a State—as opposed to a mere *continuation of wages* during periods of absence due to illness—would allegedly amount to an improper "donation" of State funds absent express *legal authority* for the State to appropriate funds for such use.[4] *See*, SSR 72–56, *supra*.

Such a consideration would not be of concern in the administration by the IRS of the provisions taxing private employers; hence the need for different treatment of sick leave payments in respect to public employers, i.e., the additional requirement imposed upon the States that such authorization in fact exists.

We think this constitutes a situation wherein it is not "practicable" for private and public employers to be treated "the same" under the Act as to the requirements imposed upon them.

In *Gardner v. Hall*, 366 F.2d 132 (10th Cir. 1966), we held:

> The Secretary has, without question, the authority and the duty to pierce any fictitious arrangements . . . when the arrangement is not in accord with reality. 366 F.2d 132 at 135.

If, by analogy, the State here has no authority to make "payments on account of sickness" such as would qualify to be excluded from "wages" under the Act, we hold that the Secretary has the authority to bar the exclusion from "wages" of such payments irregardless of how they are denominated or treated under the State's "plan."

Finally, while the State's argument for consistency of interpretation is appealing and the result desirable, such consistency has not always been found controlling where overriding considerations exist. *Compare, Ludeking v. Finch*, 421 F.2d 499 (8th Cir. 1970). We find *F.C.C. v. American Broadcasting Co.*, 347 U.S. 284 (1954) to be inapposite. Our holding is consistent with the Congressional policy underlying Federal Social Security legislation which requires courts to interpret the Act liberally, and to resolve any doubts in favor of coverage. *Rasmussen v. Gardner*, 374 F.2d 589 (10th Cir. 1967); *Dvorak v. Celebrezze*, 345 F.2d 894 (10th Cir. 1965).

AFFIRMED.

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[4] While the State categorizes HEW's concern in this regard as "absurd quibble" and an "erroneous notion." It does not specifically contend that under New Mexico law the State is empowered to make payments "solely on account of sickness." We also note that the New Mexico Attorney General's opinion dated February 15, 1971 (T. R. Vol. I, Exhibit D), is supportive of HEW's contention. On a question of state law, courts generally give careful consideration to, and regard as highly persuasive, an opinion to the State's Attorney General where there is no other State precedent directly in point. 7 Am. Jur. 2d, Attorney General §8.

DISABILITY

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Insured Status

SECTIONS 210(a)(6)(A), 216(i)(3), and 223(c)(1) (42 U.S.C. 410 (a)(6)(A), 416(i)(3), and 423(c)(1))—DISABILITY INSURANCE BENEFITS—INSURED STATUS—FEDERAL CIVILIAN EMPLOYMENT—COVERAGE OF OVERTIME PAYMENTS

20 CFR 404.116 and 404.1013 SSR 76–3c

Kaplan v. *Richardson*, 1A Unempl. Ins. Rep. Par. 14,303 (E.D. N.Y. 7/19/73), affirmed, 489 F.2d 752 (2d Cir. 1974).

Where a retired civil service employee alleges insured status under the Social Security Act for purpose of entitlement to disability insurance benefits claiming that the overtime wages he received as a federal employee should be considered covered employment *held*, the overtime wages received by a civil service employee who is covered by the Civil Service Retirement Act may not be counted as wages under the Social Security Act merely because they are not included under the Civil Service Retirement Act to compute benefits, as such overtime wages may not be viewed separately from basic wages where both are paid by the same federal agency for the same type of service.

NEAHER, District Judge:

Plaintiff commenced this action seeking review under §205(g) of the Social Security Act, 42 U.S.C. §405(g), of a final decision of the defendant Secretary of Health, Education and Welfare ("the Secretary") denying his application for establishment of a period of disability under §216, 42 U.S.C. §416, and for disability insurance benefits under §223, 42 U.S.C. §423. Defendant has moved for judgment on the pleadings, pursuant to Rule 12 (c), F.R.Civ.P.

Plaintiff, George E. Kaplan, a retired federal civil service employee, filed an application for disability insurance benefits on May 24, 1971. The application was denied on June 24, 1971; the denial was affirmed upon reconsideration by the Bureau of Disability Insurance of the Social Security Administration on September 1, 1971. Pursuant to Kaplan's request a de novo hearing was held before a hearing examiner on April 18, 1972, where his application was again denied. The Appeals Council of the Social Security Administration denied review on July 28, 1972. Thus, the hearing examiner's decision became the final decision of the Secretary, 42 U.S.C. §405(g).

Plaintiff alleged that the onset date of his disability was August 15, 1970 (Exhibit 1). He previously worked for the Social Security Administration as a claims authorizer for nearly 10 years ending in 1968. The hearing examiner found that plaintiff was not under a disability as defined in the Act for any period through September 30, 1963, when he last met the earnings requirement of the Act. The examiner also found that plaintiff did not receive quarters of coverage from overtime wages earned by him as a Civil Service employee in the Social Security Administration because those wages were excluded from covered wages under §210(a) (6) (A) of the Social Security Act, 42 U.S.C. §410(a) (6) (A).

The basic issue that plaintiff has raised throughout the administrative process and the sole issue raised here is the contention that overtime wages of federal employees should be used in calculating quarters of coverage.

Section 210(a) (6) (A) clearly excludes from the coverage of the Social Security Act those in the employ of the United States or its instrumentalities who are covered by a federal retirement system. Quarters of coverage are derived from wages earned through employment or self-employment income covered by the Social Security Act. The term wages, as defined in §209, 42 U.S.C. §409, means remuneration for employment, "including the cash value of all remuneration paid in any medium other than cash." The term employment, as defined in §210(a), 42 U.S.C. §410(a), specifically does not include service performed in the employ of the United States or one of its instrumentalities, if the service is "covered by a retirement system established by a law of the United States . . . A retirement system for employees of the Social Security Administration is established under the Civil Service Retirement Act, 5 U.S.C. §8301, et seq. ("Retirement Act"). Thus, under the Act Kaplan is not entitled to quarters of coverage on the basis of wages received from the Social Security Administration, since he is covered and presently receives benefits under the Retirement Act.

Nevertheless Kaplan argues that the overtime wages received from the Social Security Administration should be counted as wages under the Social

Security Act, because overtime wages are excluded under the Retirement Act for purposes of computing benefits under the latter Act. This contention is clearly frivolous.

Overtime wages cannot be viewed separately from basic wages, at least where both are paid by the same agency for the same type of services. Wages, as already noted, include "the cash value of *all* remuneration" received. As to whether an employment is included within the Social Security Act's coverage, the crucial question is not whether the form of remuneration is covered by a retirement system, but whether the service is covered by a retirement system. Plaintiff was clearly performing the same service at all times. Cf. *Thaxton* v. *Finch*, 301 F.Supp. 1155 (D. Tex. 1971).

Moreover, §210(b) of the Social Security Act, 42 U.S.C. §410(b), and implementing regulations provide that if services performed during more than one-half of any pay period do not constitute employment under the Act then none of the services during that pay period shall be considered employment. Plaintiff has never alleged that his overtime work constituted more than one-half of his services or time spent in any pay period (Hearing Examiner's Decision, at 6). Therefore, assuming that his overtime work is a separable service constituting employment, since all services by him are to be treated alike either as all included or excluded, all of his services must be held to be excluded.

Plaintiff further alleges that if overtime wages are not covered under the Social Security Act, the Act unconstitutionally discriminates against federal employees.

The provision of the Social Security Act excluding earnings received by federal employees covered by the Retirement Act is not arbitrary. Cf. *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). The Retirement Act became law on May 22, 1920, fifteen years before the advent of social security. The drafters of the Social Security Act felt that federal employees already had adequate retirement provisions. Congress also felt that the purposes of the two systems were somewhat different and that it would not be advantageous to disturb the existing viable federal retirement system.

Similarly, the exclusion of overtime pay for purposes of computing benefits under the Retirement Act is also not arbitrary. Congress felt that

> [i]t would be unrealistic to require the paymaster to compute thousands of biweekly paychecks with salary rates that consistently vary because of overtime pay. Some employees might work overtime at a given point in their Federal career but have their high-five average based on a period which included little or no overtime. (1966 U.S. Code Cong. & Admin. News, at 3810.)

Thus, it can be seen that this classification serves the reasonable purpose of standardizing payroll deductions and computations, by excluding sporadic and irregular overtime pay.

In sum, while the interplay of the two statutes may result in a difference in treatment between federal employees and those who are not, this difference is not discrimination; it is at most an anomaly. The provisions in controversy are rationally based and free from invidious discrimination. Cf. *Florio* v. *Richardson*, 469 F.2d 803, 808 (2 Cir. 1972).

Accordingly, defendant's motion for judgment on the pleadings is granted.

Evaluation of Impairments

SECTIONS 216(i) and 223 (42 U.S.C. 416(i) and 423)—DISABILITY—EVALUATION OF IMPAIRMENTS—COMBINATION OF IMPAIRMENTS

20 CFR 404.1501 SSR 76–35c

York v. *Secretary of Health, Education, and Welfare,* U.S.D.C., N.D. Ill., No. 75 C 476 (10/24/75)

> The plaintiff's claim for disability insurance benefits and a period of disability under sections 223 and 216(i) of the Social Security Act was denied by the Secretary. The claimant alleged that certain gunshot wounds had rendered him unable to engage in substantial gainful activity because they resulted in a hernia, paralysis of his right leg, headaches, and nausea. On appeal to the U.S. District Court, it was *held,* the alleged impairments, some of which (i.e., the hernia) were correctible through surgery, and others of which (i.e., the alleged paralysis, headaches and nausea) were not supported by clinical evidence, individually or in combination, were not sufficiently severe to prevent the claimant from engaging in substantial gainful activity. While the claimant suffered some limitation due to his injury, he retains the functional capability for light work. His age, education, and past work experience are consistent with the ability to perform such work.

LYNCH, District Judge:

Plaintiff brought this action pursuant to Section 405(g) of Title 42 of the United States Code seeking judicial review of a final decision of the Secretary of Health, Education and Welfare denying his claim for disability insurance benefits under 42 U.S.C. Section 423 and for a period of disability under 42 U.S.C. Section 416(i).

Plaintiff's original application was originally denied and was again denied on reconsideration by the Bureau of Disability Insurance of the Social Security Administration. An administrative law judge considered the case *de novo* and found that plaintiff was not under a disability. It is this decision which plaintiff now seeks to overturn. This Court must determine whether the decision of the Administrative Law Judge was supported by substantial evidence. The evidence before that judge can be summarized as follows.

Plaintiff's alleged disability stems from certain gunshot wounds suffered by him in 1969. Certain physical impairments are said to have resulted from these wounds including a hernia, a limp in one leg, headaches and vomiting. The Court will consider each one of the alleged impairments individually.

THE HERNIA

Plaintiff was shown to be suffering from a large ventral hernia. This fact was verified by three doctors. However, it must be noted that one doctor stated that he recommended to the plaintiff that he wear an abdominal support and defendant disregarded this recommendation although it should be noted that the doctor acknowledged that wearing the support would be hot, uncomfortable and unsanitary.

Another doctor advised plaintiff to have his condition repaired surgically. Although plaintiff could apparently have had this done surgically without charge at Cook County Hospital due to his status as a public aid recipient, he declined to do so.

THE LIMP

Plaintiff asserts that he suffers from paralysis in his right leg. Although two doctors indicated that plaintiff walked with a limp, they stated that there was little indication of paralysis.

Clinical evidence indicated that signs of sciatica were present in plaintiff's right side leading to a reduced knee jerk and a slight atrophy of the calf in the plaintiff's right leg. Although one doctor felt that plaintiff could not stand and walk between six and eight hours a day, he stated that plaintiff could occasionally climb stairs or ladders, he could frequently lift up to ten pounds, and could reach overhead. Dr. Miller described plaintiff's condition as a "moderate disability from an orthopedic viewpoint."

It must be further noted that plaintiff had a 15 degree restriction in flexion and 5 degree restriction in rotation of his neck. Plaintiff also suffered from a 10 degree loss of flexion and 5 to 10 degree loss of rotation in the thoracic lumbar area. There was minimal degenerative arthritis in the cervical spine.

HEADACHES and VOMITING

Evidence of these impairments was limited to plaintiff's complaints at the time of the hearing. He had also indicated to one doctor that he had suffered from nausea. There was some evidence to the effect that the gastrointestinal problems were related to plaintiff's hernia condition.

PLAINTIFF'S EDUCATIONAL BACKGROUND AND WORKING EXPERIENCE

Plaintiff was born in 1927. He completed high school and attended classes in drafting at Cameron College.

Plaintiff worked as a pattern maker in the furniture industry from 1947 to 1965. His job involved knowing how to read blueprints and being able to draft patterns. From 1965 to 1966 he worked as a set up man in the furniture industry. From 1966 to 1973, plaintiff worked for a funeral home performing general maintenance work. Doctor Conte, one of the examining doctors, reported in November of 1973 that plaintiff had done some carpentry work around his house and that he did this work without any apparent problem.

To qualify for insurance benefits and a period of disability under Sections 423 and 416(i) of Title 42, an individual must show that he is under a "disability" as defined in the Social Security Act. Section 423(d)(1)(A) defines disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical . . . impairment." Section 423(d)(2) indicates that:

> (A) an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him or whether he would be hired if he applied for work.

The burden of proof rests upon the plaintiff to establish that he is entitled to disability insurance benefits under the Social Security Act. *Jerald* v. *Richardson*, 445 F.2d 36 (7th Cir. 1971). The final decision of the Secretary in the instant case found that plaintiff had failed to meet this burden. This Court believes that there is substantial evidence to support that finding.

In the case of plaintiff's hernia, he has refused to take any remedial measures to alleviate the condition. He does not wear an abdominal support, as recommended, and he refuses to submit to corrective surgery. It is true that neither of these steps is completely attractive as they may fall short of a total panacea. However, some remedial action is called for and plaintiff's unwillingness to take any steps in this direction militates against his cause. A hernia has been held to be a remediable condition and does not necessarily entitle a claimant to disability benefits under the Act. *Richardson* v. *Secretary of Health, Education and Welfare*, 371 F.2d 542 (7th Cir. 1966). It has been held that if a claimant's impairment results from his wilful and unreasonable refusal to undergo treatment or corrective surgery, the presence of that impairment will not constitute a basis for the award of disability benefits. See *Flynn* v. *Secretary of Health, Education and Welfare*, 344 F. Supp. 94 (E.D. Wis. 1972) and *McCarty* v. *Richardson*, 459 F.2d 3 (5th Cir. 1972). The weight of the evidence supports the Secretary's conclusion that plaintiff's hernia is not totally disabling under the circumstances of this case.

Definite signs of sciatica and mild atrophy in plaintiff's right leg support the conclusion that plaintiff is suffering from certain restrictions of his physical capabilities. Nonetheless, plaintiff's condition was described by a doctor as a "moderate disability" and there was no indication that plaintiff has been totally disabled. The partial loss of functional use in a leg does not necessarily establish a disability. *Workman* v. *Celebrezze*, 360 F.2d 877 (7th Cir. 1966).

Concerning plaintiff's claim of nausea and vomiting, there is evidence indicating that these physical reactions are related to plaintiff's hernia and the remarks previously made regarding the hernia are equally applicable here. There is no objective clinical evidence in the record that plaintiff's complaints of headaches amount to a condition which is so constant and severe as to amount to a disability which would prevent him from engaging in substantial gainful activity.

The Court finds that plaintiff's physical impairments, either individually or in combination, fail to establish a disability as defined in the Act. *Bledsoe* v. *Richardson*, 469 F.2d 1288 (7th Cir. 1972).

The conclusion reached by this Court is further supported by the evidence in the record concerning gainful activity engaged in by plaintiff following the onset of his physical impairments. It is undisputed that he engaged in substantial work for a period of four years following the shooting incident which gave use to his various impairments. This work demonstrates that plaintiff is capable of engaging in substantial gainful activity. *Kutchman* v. *Cohen*, 425 F.2d 20 (7th Cir. 1970); *Breska* v. *Richardson*, 346 F. Supp. 1150 (E.D. Wis. 1972). There is insufficient evidence to demonstrate that plaintiff's impairments have become progressively disabling so as to preclude all work.

Plaintiff's educational background, including the completion of high school and some drafting courses in college, indicate that he is not under a severe handicap in terms of literacy or job training. In the administrative proceedings, the Secretary took administrative notice of alternative modes of substantial gainful activity that plaintiff might engage in. It is proper for the Secretary to take such notice. *Floyd* v. *Finch*, 441 F.2d 73 (6th Cir. 1971). Although there was evidence that plaintiff may no longer be able to engage in strenuous activities, there is sufficient evidence to indicate that he could perform light carpentry work or other activities which do not require great amounts of physical exertion. The ability to engage in alternative forms of substantial gainful activity precludes a finding of "disability" under the Social Security Act.

Based upon the preceding analysis, the decision of the Secretary of Health, Education and Welfare is affirmed.

Reduction of Benefits

SECTION 224(a) and (b) (42 U.S.C. 424(a) and (b))—DISABILITY—REDUCTION OF BENEFITS DUE TO RECEIPT OF WORKMEN'S COMPENSATION

20 CFR 404.408(d) SSR 76–34c

Vaughn vs. *Mathews*, U.S.D.C. S.D. Ohio, No. 8627 (2/18/76)

> Where the Secretary reduced claimant's social security disability insurance benefits on the basis of a lump-sum amount he received in settlement of his workmen's compensation claim, he contended that the reduction was improper because (1) the lump-sum settlement was not based on a finding that he was 'entitled' to workmen's compensation, (2) the lump-sum payment was not a true substitute for periodic payments, and (3) alternatively, those of his medical expenses which were covered by medicare should not have been counted for reduction purposes. *Held*, the reduction was proper because (1) any workmen's compensation award, regardless of whether paid as a settlement compromise, inherently represents a finding that the claimant is 'entitled', (2) a lump-sum award can be regarded as a substitute for periodic payments even where the award does not specifically equate the lump-sum to specific periodic amounts, and (3) medical expenses covered by medicare could not be excluded in computing the reduction because they were not 'paid or incurred' by the claimant.

PORTER, District Judge:

This is an action under 42 U.S.C. § 405(g). Plaintiff seeks review of the decision of the Secretary holding that plaintiff's disability insurance benefits were subject to a reduction under the "workmen's compensation offset" provisions of 42 U.S.C. § 424a. The case is here for general judicial review on the merits and is before us on the submissions of each side (doc. 9 for plaintiff; doc. 12 for defendant).

The plaintiff became entitled to disability benefits effective July 1969 but the benefits were subject to a reduction due to his entitlement to weekly workmen's compensation for a period ending in March 1970. Thereafter, he claimed further workmen's compensation for a psychiatric disability. This subsequent claim culminated in an agreement in April 1971 with the workmen's compensation administrator whereby the plaintiff settled his claim for "$8,500.00, plus unpaid medical bills on file." The settlement was made in full satisfaction of all claims and, after attorney fees were paid, the lump sum received by the claimant under the settlement agreement was $5,666.67.

The Appeals Council found that the plaintiff's disability benefits were subject to offset in the amount of $3,366.67—the $5,666.67 previously determined less $2,300 attributable to medical expenses after the date of the workmen's compensation award.

Title 42 U.S.C. § 424a(a) provides in pertinent part:

> "(a) If for any month prior to the month in which an individual attains the age of 62—
>
> (1) such individual is entitled to benefits under section 223 (42 U.S.C. § 423), and
>
> (2) such individual is *entitled* for such month, under a workmen's compensation law or plan of United States or a State, to periodic benefits for total or partial disability (whether or not permanent), and the Secretary has, in a prior month, received notice of such entitlement for such month,
>
> the total of his benefits under section 223 (42 U.S.C. § 423) for such month and of any benefits under section 202 (42 U.S.C. § 402) for such month based on wages and self-employment income shall be reduced. . . ." (Emphasis added).

And, Title 42 U.S.C. § 424a(b) reads as follows:

> "(b) If any periodic benefit under a workmen's compensation law or plan is payable on other than a monthly basis (excluding a benefit payable as a lump sum except to the extent that it is a *commutation of, or a substitute for, periodic payments*),
>
> the reduction under this section shall be made. . . ." (Emphasis added).

It is plaintiff's contention that the offset provisions of § 424a(a) and (b) are not applicable to the settlement of April 1971 because: 1) plaintiff's settlement and resulting lump sum payment was not based upon a determination by Ohio authorities that plaintiff was "entitled" to workmen's compensation benefits, and 2) the lump sum payment was not a true substitute for periodic payments—i.e., not a "commutation of, or a substitute for, periodic payments" within the meaning of § 424a(b). Alternatively, plaintiff argues that even if the settlement of April 1971 does fall within the scope of § 424a, more medical expenses should have been excluded from the offset pursuant to 20 C.F.R. § 404.408(d).

We turn first to plaintiff's contention that the offset provisions of the Social Security Act are inapplicable since they only come into play where a person is "entitled" to workmen's compensation benefits and, here, the benefits received by plaintiff were not awarded pursuant to any explicit finding of entitlement. We find this argument to be without merit. As the Secretary points out (doc. 12, p. 3) the following language of Section 4123.54 of the Ohio Revised Code makes it clear that compensation benefits can only be made if the recipient is "entitled" to receive such benefits:

> "Every employee, who is injured or who contracts an occupational disease, . . . wherever such injury has occurred or occupational disease has been contracted, provided the same were not purposely self-inflicted, is *entitled* to receive . . . such compensation for loss sustained on account of such injury, occupational disease or death, and such medical, nurse, and hospital services and medicines, and such amount of funeral expenses in case of death, *as are provided by sections 4123.01 to 4123.94* inclusive, of the Revised Code. (Emphasis added).

Since the settlement of April 1971 was pursuant to Ohio Revised Code Section 4123.65, it is apparent that the compensation received was based on entitlement. We do not think the "denial of liability" recitation which appears in the settlement documents indicates that the Ohio Industrial Commission paid the plaintiff benefits to which he was not entitled. Indeed, plaintiff provides no authority of any kind for the proposition that benefits could properly be awarded absent "entitlement." We must conclude that plaintiff was entitled to the lump-sum settlement of April 1971.

Plaintiff further argues that the offset provisions of the Social Security Act are not applicable because the lump sum he received was not a true substitute for periodic payments. In rejecting this argument, the Appeals Council relied on *Paris Stone* v. *Richardson*, CCH UIR, Fed. para. 16, 093 and 17,044 (S.D. Ohio 1970, 1973). We think that reliance is well placed. *Paris Stone* holds that the workmen's compensation offset applies to a lump sum settlement reached under Ohio Revised Code Section 4123.65. Indeed, the fact that there was never a determination in that case of "either the period involved in periodic payment or the amount involved in a periodic payment" indicates that a lump sum settlement under Section 4123.65 can be regarded as a substitute for periodic payments even where the lump sum has never been equated to a specific monthly or other periodic amount. Plaintiff's cases do not detract from the *Paris Stone* holding, and the Appeals Council cited two cases which are similar to ours in which lump sum settlements have been treated as substitutes for periodic payments (Tr. 161–62). Accordingly, we think plaintiff's argument on this point is not well taken.

We turn now to plaintiff's alternative argument that no part of the $8,500 lump sum settlement should have been subject to offset because it *all* went for legal fees and medical expenses. The Appeals Council addressed this issue in considerable detail and, rather than repeat the Council's discussion *in toto*, we shall merely attach the pertinent portion (Tr. 162–64) of their decision at the end of our opinion. For summation purposes, suffice it to say that the Council determined that, in addition to the $2,833.33 of attorney fees which were not subject to offset, there should be $2,300 excluded from the offset amount which $2,300 represented reasonable medical expenses paid or incurred by plaintiff between April 1971 (the settlement date) and July 1, 1973 (the date he became eligible for Medicare). In essence, plaintiff argues that the Secretary erred by not excluding medical expenses covered by Medicare from the offset.

The applicable regulation, 20 C.F.R. § 404.408(d), provides in pertinent part as follows:

> "(d) *Items not counted for reduction. Amounts paid or incurred,* or to be incurred *by the individual* for medical, legal, or related expenses in connection with his workmen's compensation claim, or the injury or occupational disease on which his workmen's compensation award or settlement is based, *are excluded* in computing this reduction under paragraph (a) of this section *to the extent that they are consonant with State law* . . . ." (Emphasis added).

Citing this language, plaintiff argues: 1) that disability benefits are not to be reduced if such reduction is not in accord with State law; 2) that in Ohio, a "collateral source" may not properly be considered in diminution of damages; and 3) that, therefore, workmen's compensation benefits cannot properly be used to offset Social Security disability benefits to which claimant is otherwise entitled. We find this argument unpersuasive because, as the Secretary points out (doc. 12, p. 5), it is based upon an "ungrammatical and illogical" interpretation of the regulation. We believe an analysis of the pertinent language indicates that the "they" which must be consonant with State law refers to "*amounts* paid or incurred" and not to the "exclusion" of such amounts in computing the reduction. That is, medical expenses, paid or incurred *by the individual* are excluded from offset *to the extent that they* (the amounts of said expenses) are consonant with State law. We think it is clear that the regulation's "consonant with State law" language is addressing the question of *how much* may be excluded and therefore only comes into play where an exclusion from offset is shown to be proper in accordance with the rest of the regulation—i.e., where qualifying medical expenses have been paid or incurred by the individual.[1] Thus, the permissibility of an exclusion is to be determined in accordance with the Social Security Act and the appropriate regulation promulgated thereunder (i.e., 20 C.F.R. § 404.408), and only the amount of such a permissible exclusion is affected in any way by State law—i.e., the amounts are excluded "to the extent that they are consonant with State law." We agree with the Secretary (doc. 12, p. 5) that if the draftsman of the regulation meant to say that the permissibility of an exclusion were to be determined according to State law, he would not have written "to the extent *they are* consonant with State law" but instead would have written "to the extent that *such exclusion is* consonant with State law," or some equivalent thereof. In short, we think plaintiff's interpretation of the regulation is unsound. It is our opinion that Ohio's "collateral source" rule has no bearing on this case. In this connection, we would simply state that the cases cited by plaintiff are not on point—they deal generally with the topic of collateral source but have nothing to do with the sort of Social Security issues presently before us.

In what appears to be almost afterthought fashion, plaintiff "throws in" two final arguments which we shall address briefly. First, plaintiff contends that since his eligibility for health insurance was not foreseeable when the settlement was reached in April 1971, his subsequent eligibility should have been ignored in calculating offset. The fact remains that plaintiff's Medicare eligibility was a *fait accompli* by the time offset was considered and calculated by the Secretary, and the plaintiff advances no reason why the Secretary should have (or dutifully could have) ignored the relevant facts and circumstances existing at that time. Secondly, and lastly, plaintiff argues that the offset regulation, 20 C.F.R. § 404.408(d), is invalid to the extent it goes beyond workmen's compensation "entitlements" and "purports to cover settlement agreements and compromises." As may properly be inferred from our earlier discussion, the concept of "entitlement" to benefits is not inherently at odds with settlements and compromises. Whatever a State agency pays, whether by virtue of settlement or otherwise, may be said to represent a finding as to the amount of benefits to which a claimant is "entitled." In any case, the Secretary's regulations are presumed valid and should not be overturned on the basis of an unsupported, one-sentence argument such as that advanced by plaintiff at the closing of his brief.

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[1] Here, of course, it is the Secretary's position that medical expenses covered by Medicare do not represent amounts paid by the individual.

For the foregoing reasons, the Secretary's decision represents a proper application of the law and the regulations to the undisputed facts and must, therefore, be affirmed.

Substantial Gainful Activity

SECTIONS 216(i) and 223(d) (42 U.S.C. 416(i) and 423(d))—DISABILITY INSURANCE BENEFITS—SUBSTANTIAL GAINFUL ACTIVITY—REBUTTAL OF PRESEMPTION OF ABILITY TO ENGAGE IN SUBSTANTIAL GAINFUL ACTIVITY

20 CFR 404.1501 and 404.1532—404.1534 SSR 76–4a

Where claimant in April 1972 filed application for a period of disability and disability insurance benefits alleging inability to work from August 1970 because of knee injuries but thereafter engaged in sporadic work activities for 3 month periods earning in excess of $140 per month and evidence established that each work attempt aggravated the knee impairments and necessitated discontinuance of work, hospitalization and surgery, *held*, the presumption that claimant was engaging in substantial gainful activity during his work attempts because of earnings in excess of $140 a month (the amount of monthly earnings which then created a presumption of substantial gainful activity) is rebutted by "affirmative evidence" showing that his impairments precluded sustained occupational activity in that such activity took place during three brief intervals over approximately a two year period and was interrupted by aggravation of impairment following each period of work activity; therefore, claimant is entitled to a period of disability commencing in August 1970 and continuing through September 1972.

D, the claimant filed an application for disability benefits on April 25, 1972, alleging inability to work from August 11, 1970, because of injuries to his knees. The evidence establishes that the claimant injured both knees on August 11, 1970 and, as a result, stopped working.

The diagnosis was chondromalacia of the patella of both knees. A long leg cast was applied on the left leg and it was removed by November 17, 1970.

D continued to improve and was able to return to light duty on November 24, 1970, working about 20 hours a week for about $3.30 an hour for 14 weeks. Sometime after December 1, 1970, D started to complain of knee pain again. On February 24, 1971, he entered the hospital and a patellectomy of the right knee was performed. His postoperative course was uneventful and he was discharged from the hospital on March 1, 1971. On June 21, 1971, he returned to work on a regular 40-hour basis. However, a strain was placed on his left knee while the right knee was healing. He reentered the hospital on September 14, 1971, for a patellectomy of the left knee. His postoperative course was uneventful and he was discharged on September 21, 1971. D returned to full-time work on January 17, 1972, and worked until March 11, 1972, when he resigned. On April 3, 1972, he went to work selling advertising and quit after 3 weeks. When the claimant was examined in April 1972, a slight looseness of one of the ligaments of the right knee was noted as well as a lump which appeared with pain on flexion and extension of the left knee. As recommended by the examining physician, the claimant underwent surgery for the removal of the mass from the left knee in July 1972. Following surgery, the doctor expressed the opinion that the claimant would not be able to return to work before October 1, 1972. When D was reexamined on September 28, 1972, the only restriction placed on his work activity was that he should not engage in any work requiring prolonged standing or heavy lifting.

The claimant has stated that in the fall of 1972, he became a full-time college student. The X State Employment office has tried to obtain a telephone solicitors job for him at $1.40 an hour, which he felt was not very substantial. In addition thereto, he has been looking for part-time work that would not interfere with college. So far he has been unsuccessful.

When the claimant was examined on February 14, 1973, it was noted that he had a good range of motion in both knees. There was some weakness of both quadriceps; however, the only restriction placed on the claimant's activities was that he could not do a lot of stooping and bending.

Section 216(i) of the Social Security Act provides for the establishment of a period of disability, and section 223 provides for the payment of disability insurance benefits. As amended in 1965, both sections define "disability" (except for certain cases of blindness) as an inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. A "physical or mental impairment" is defined in section 223 as an impairment that results from anatomical, physiological or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

Section 223(d)(2)(A) provides in pertinent part, that:

> . . . an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), 'work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives

or in several regions of the country.

In evaluating D's work activities from November 24, 1970, to February 23, 1971; June 21, 1971 to September 4, 1971; and January 17, 1972, to approximately the middle of April 1972, the criteria set forth in Social Security Administration Regulations No. 4 is applicable. In this regard section 404.1532(a) of such regulations (20 CFR 404.1532(a)) states:

> If an individual performed work during any period in which he alleges that he was under a disability . . . the work performed may demonstrate that such individual has ability to engage in substantial gainful activity. . . .

Further, section 404.1534(a) (20 CFR 404.1534(a)) of this regulation states, in pertinent part:

> Where an individual who claims to be disabled engages in work activities, the amount of his earnings from such activities may establish that the individual has the ability to engage in substantial gainful activity. Generally, activities which result in substantial earnings would establish ability to engage in substantial gainful activity***. Where an individual is forced to discontinue his work activities after a short time because his impairment precludes continuing such activities, his earnings would not demonstrate ability to engage in substantial gainful activity.***

Subparagraph (b) of this section of the regulations then in effect, pointed out that:

> An individual's earnings from work activities averaging in excess of $140 a month shall be deemed to demonstrate his ability to engage in substantial gainful activity *unless* there is affirmative evidence that such work activities themselves establish that the individual does not have the ability to engage in substantial gainful activity under the criteria in §§404.1532 and 404.1533 and paragraph (a) of this section. (Emphasis supplied) [1]

The evidence establishes that during each of the three work attempts, the claimant's earnings were in excess of $140 per month, with the exception perhaps of April 1972. However, each work attempt resulted in hospitalization and surgery. Each return to work lasted approximately 3 months, but in light of the chronology of the claimant's impairments as demonstrated by the medically acceptable evidence, with due regard to the amount of earnings, it appears that those 3 month periods were not of significant length as to lead to a conclusion that the claimant demonstrated an ability thereby to engage in substantial gainful activity. Thus, the presumption that the claimant was engaging in substantial gainful activity during each of his three brief abortive work attempts because his earnings were in excess of $140 a month has been rebutted by "affirmative evidence" showing that his impairments precluded sustained occupational activity. Moreover, the nature of the claimant's impairments, his age, education and vocational attainment, and the efforts by his employer to accommodate the work situation to his impairments, are persuasive to a conclusion that such work activities themselves established that the claimant did not have the functional capability to engage in substantial gainful activity. Of somewhat less relevance to the resolution of the ultimate issue, but certainly appropriate for concern, is the belief that the claimant should not be penalized for his strong motivation for work.

However, the evidence conclusively shows that by October 1, 1972, the

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[1] The amount of monthly earnings which creates a presumption of substantial gainful activity has, since January 1, 1974, been $200.00. See 39 FR 32757, September 11, 1974, and 40 FR 31778, July 29, 1975. This amount may change because of increases in earnings levels.

claimant had regained sufficient functional ability to engage in his previous occupation of keeping automotive shop records and in a wide variety of similarly related light and sedentary work commensurate with his age, education, and vocational experience.

Accordingly, the Appeals Council *held* the claimant was under a "disability" which began on August 11, 1970, and continued through September 30, 1972, but not thereafter.

Termination of Benefits

SECTIONS 205(g), 221, and 223 (42 U.S.C. 405(g), 421, and 423)—DISABILITY INSURANCE BENEFITS—CONSTITUTIONALITY OF TERMINATION OF BENEFITS WITHOUT PRIOR HEARING—APPEALS PROCESS

20 CFR 404.306, 404.907, 404.909, 404.917 404.945, and 404.951
SSR 76–23c

Mathews v. Eldridge 96 S. Ct. 893 (1976)

The claimant, a disability insurance beneficiary, was notified by the state disability determination agency of a tenative decision that his disability had ceased and that he might request reasonable time to furnish additional information pertaining to his condition. In the beneficiary's written response, he indicated that the state agency already had enough evidence to establish his disability. Thereafter, the State made a determination that the beneficiary had ceased to be disabled. This determination was accepted by the Social Security Administration which notified the beneficiary that his benefits would be terminated and that he had a right to seek reconsideration of this termination by the state agency within six months. Instead of following the normal appeals process, the beneficiary filed a court action challenging the constitutional validity of terminating his benefits without a prior evidentiary hearing. *Held*, that unlike the situation involving welfare payments, due process does not require an evidentiary hearing prior to the termination of disability insurance benefits because (1) since eligibility for disability benefits is not based on financial need, the hardship which might be imposed by an erroneous termination is likely to be less than that which would occur in the termination of welfare payments; (2) since determinations of continuing disability normally turn on consideration of routine, unbiased medical reports by physicians, the potential value of an evidentiary hearing in a disability situation is substantially less than in the welfare context; (3) since, prior to termination of benefits, the disability beneficiary has full access to the information and reasons relied on by the state agency and has opportunity to submit arguments and evidence in writing, he thus has an effective means for communicating his case to the decision maker; and (4) requiring an evidentiary hearing upon demand prior to termination of disability benefits would entail fiscal and administrative burdens which would outweigh any countervailing benefits. *Also held*, in view of the claimant's presentation to the Secretary of a claim for benefits and his colorable claim that retroactive payments would not compensate him for damages suffered by erroneous termination, the court had jurisdiction for review under section 205(g) of the Act in spite of the facts that claimant failed to utilize available administrative review procedures and nor-

mally only the Secretary can waive the requirement for exhaustion of such administrative remedies.

Powell, J., delivered the opinion of the Court, in which Burger, C.J., and Stewart, White, Blackmu, and Rehnquist, J.J. joined. Brennan, J. filed a dissenting opinion, in which Marshall, J., joined. Stevens, J. took no part in the consideration or decision of the case.

The issue in this case is whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing.

I

Cash benefits are provided to workers during periods in which they are completely disabled under the disability insurance benefits program created by the 1956 amendments to Title II of the Social Security Act. 70 Stat. 815, 42 U.S.C. §423.[1] Respondent Eldridge was first awarded benefits in June 1968. In March 1972, he received a questionnaire from the state agency charged with monitoring his medical condition. Eldridge completed the questionnaire, indicating that his condition had not improved and identifying the medical sources, including physicians, from whom he had received treatment recently. The state agency then obtained reports from his physician and a psychiatric consultant. After considering these reports and other information in his file the agency informed Eldridge by letter that it had made a tentative determination that his disability had ceased in May 1972. The letter included a statement of reasons for the proposed termination of benefits, and advised Eldridge that he might request reasonable time in which to obtain and submit additional information pertaining to his condition.

In his written response, Eldridge disputed one characterization of his medical condition and indicated that the agency already had enough evidence to establish his disability.[2] The state agency then made its final determination that he had ceased to be disabled in May 1972. This determination was accepted by the Social Security Administration (SSA), which notified Eldridge in July that his benefits would terminate after that month. The notification also advised him of his right to seek reconsideration by the state agency of his initial determination within six months.

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[1] The program is financed by revenues derived from employee and employer payroll taxes. 26 U.S.C. §§3101(a), 3111(a 42 U.S.C. §401(b). It provides monthly benefits to disabled persons who have worked sufficiently long to have an insured status, *id.*, §423(c)(1)(A), and who have had substantial work experience in a specified interval directly preceding the onset of disability. *Id.*, §423(c)(1)(B). Benefits also are provided to the workers's dependents under specified circumstances. *Id.*, §§402(b)(d). When the recipient reaches age 65 his disability benefits are automatically converted to retirement benefits. *Id.*, §§416(2)(D) 423(a)(I). In fiscal 1974 approximately 3,700,000 persons received assistance under the program. Social Security Administration, The Year in Review 21 (1974).

[2] Eldridge originally was disabled due to chronic anxiety and back strain. He subsequently was found to have diabetes. The tentative determination letter indicated that aid would be terminated because available medical evidence indicated that his diabetes was under control, that there existed no limitations on his back movements which would impose severe functional restrictions, and that he no longer suffered emotional problems that would preclude him from all work for which he was qualified. App. 12–13 In his reply letter he claimed to have arthritis of the spine rather than a strained back.

Instead of requesting reconsideration Eldridge commenced this action challenging the constitutional validity of the administrative procedures established by the Secretary of Health, Education, and Welfare for assessing whether there exists a continuing disability. He sought an immediate reinstatement of benefits pending a hearing on the issue of his disability.[3] 361 F.Supp. 520 (WD Va. 1973). The Secretary moved to dismiss on the grounds that Eldridge's benefits had been terminated in accordance with valid administrative regulations and procedures and that he had failed to exhaust available remedies. In support of his contention that due process requires a pretermination hearing, Eldridge relied exclusively upon this Court's decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970), which established a right to an "evidentiary hearing" prior to termination of welfare benefits.[4] The Secretary contended that *Goldberg* was not controlling since eligibility for disability benefits, unlike eligibility for welfare benefits, is not based on financial need and since issues of credibility and veracity do not play a significant role in the disability entitlement decision, which turns primarily on medical evidence.

The District Court concluded that the administrative procedures pursuant to which the Secretary had terminated Eldridge's benefits abridged his right to procedural due process. The court viewed the interest of the disability recipient in uninterrupted benefits as indistinguishable from that of the welfare recipient in *Goldberg*. If further noted that decisions subsequent to *Goldberg* demonstrated that the due process requirement of pretermination hearing is not limited to situations involving the deprivation of vital necessities. See *Fuentes v. Shevin*, 407 U.S. 67, 88–89 (1972); *Bell v. Burson*, 402 U.S. 535 (1971). Reasoning that disability determinations may involve subjective judgments based on conflicting medical and nonmedical evidence, the District Court held that prior to termination of benefits Eldridge must be afforded an evidentiary hearing of the type required for welfare beneficiaries under Title IV of the Social Security Act. *Id.*, at 528.[5] Relying entirely upon the District Court's opinion, the Court of Appeals for the Fourth Circuit affirmed the injunction barring termination of Eldridge's benefits prior to an evidentiary hearing. 493 F.2d 1230 (1974).[6] We reverse.

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[3] The District Court ordered reinstatement of Eldridge's benefits pending its final disposition on the merits.

[4] In *Goldberg* the Court held that the pretermination hearing must include the following elements: (1) "timely and adequate notice detailing the reasons for the proposed termination"; (2) "an effective opportunity [for the recipient] to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally"; (3) retained counsel, if desired.; (4) an "impartial" decisionmaker; (5) a decision resting "solely on the legal rules and evidence adduced at the hearing"; (6) a statement of reasons for the decision and the evidence relied on. 397 U.S., at 226–271. In this opinion the term "evidentiary hearing" refers to a hearing generally of the type required in Goldberg.

[5] The HEW regulations direct that each state plan under the federal categorical assistance programs must provide for pretermination hearings containing specified procedural safeguards, which include all of the *Goldberg* requirements. See 45 CFR §205.10(a); n. 4 *supra*.

[6] The Court of Appeals for the Fifth Circuit, simply noting that the issue had been correctly decided by the District Court in this case, reached the same conclusion in *Williams v. Weinberger*, 494 F.2d 1191 *(per curiam)*, petition for cert. filed, 43 U.S.L.W. 3175 (U.S. Sept 8, 1974) (No. 74–205)

II

At the outset we are confronted by a question as to whether the District Court had jurisdiction over this suit. The Secretary contends that our decision last Term in *Weinberger v. Salfi*, 422 U.S. 749 (1975), bars the District Court from considering Eldridge's action. *Salfi* was an action challenging the Social Security Act's duration-of-relationship eligibility requirements for surviving wives and stepchildren of deceased wage earners. We there held that 42 U.S.C. §405(h) [7] precludes federal question jurisdiction in an action challenging denial of claimed benefits. The only avenue for judicial review is 42 U.S.C. §405(g), which requires exhaustion of the administrative remedies provided under the Act as a jurisdictional prerequisite.

Section 405(g) in part provides

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow." [8]

On its face §405(g) thus bars judicial review of any denial of a claim of disability benefits until after a "final decision" by the Secretary after a "hearing." It is uncontested that Eldridge could have obtained full administrative review of the termination of his benefits, yet failed even to seek reconsideration of the initial determination. Since the Secretary has not "waived" the finality requirement as he had in *Salfi*, *supra*, at 767, he concludes that Eldridge cannot properly invoke §405(g) as a basis for jurisdiction. We disagree.

Salfi identified several conditions which must be satisfied in order to obtain judicial review under §405(g). Of these, the requirements that there be a final decision by the Secretary after a hearing was regarded as "central to the requisite grant of subject matter jurisdiction. . . ." *Id.*, at 764.[9] Implicit in *Salfi*, however, is the principle that this condition consists of two elements, only one of which is purely "jurisdictional" in the sense that it cannot be "waived" by the Secretary in a particular case. The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted. The nonwaivable element is the requirement that a claim for benefits shall have been presented to the Secretary. Absent such a claim there can be no "decision" of any type. And some decision by the Secretary is clearly required by the statute.

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[7] Title 42 U.S.C. §405(h) provides in full "Finality of Secretary's decision

(h) The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

[8] Section 405(g) further provides

"Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive.

[9] The other two conditions are (1) that the civil action be commenced within 60 days after the mailing of notice of such decision or within such additional time as the Secretary may permit, and (2) that the action be filed in an appropriate district court. These two requirements specify a statute of limitations and appropriate venue, and are waivable by the [illegible], *supra*, at 763–764. As in *Salfi* no question as to whether Eldridge satisfied these requirements was timely raised below, see Fed. Rule Civ. Proc. 8(c), 42(h)(1), and they need not be considered here.

That this second requirement is an essential and distinct precondition for §405(g) jurisdiction is evident from the different conclusions that we reached in *Salfi* with respect to the named appellees and the unnamed members of the class. As to the latter the complaint was found to be jurisdictionally deficient since it "contain[ed] no allegations that they have even filed an application with the Secretary . . . ." *Ibid.* With respect to the named appellees, however, we concluded that the complaint was sufficient since it alleged that they had "fully presented their claims for benefits 'to their district Social Security Office, and upon denial, to the Regional Office for reconsideration' " *Id.*, 764–765. Eldridge has fulfilled this crucial prerequisite. Through his answers to the state agency questionnaire, and his letter in response to the tentative determination that his disability had ceased, he specifically presented the claim that his benefits should not be terminated because he was still disabled. This claim was denied by the state agency and its decision was accepted by the SSA.

The fact that Eldridge failed to raise with the Secretary his constitutional claim to a pretermination hearing is not controlling.[10] As construed in *Salfi*; §405(g) requires only that there be a "final decision" by the Secretary with respect to the claim of entitlement to benefits. Indeed, the named appellees in *Salfi* did not present their constitutional claim to the Secretary. *Salfi*, App. 11, 17–21. The situation here is not identical to *Salfi*, for, while the Secretary had no power to amend the statute alleged to be unconstitutional in that case, he does have authority to determine the timing and content of the procedures challenged here. §405(a). We do not, however, regard this difference as significant. It is unrealistic to expect that the Secretary would consider substantial changes in the current administrative review system at the behest of a single aid recipient raising a constitutional challenge in an adjudicatory context. The Secretary would not be required even to consider such a challenge.

As the nonwaivable jurisdictional element was satisfied, we next consider the waivable element. The question is whether the denial of Eldridge's claim to continued benefits was sufficiently "final decision" with respect to his constitutional claim to satisfy the statutory exhaustion requirement. Eldridge concedes that he did not exhaust the full set of internal review procedures provided by the Secretary. See 20 CFR §§ 404.910, 404.916, 404.940. As *Salfi* recognized, the Secretary may waive the exhaustion requirement if he satisfies himself, at any stage of the administrative process, that no further review is warranted either because the internal needs of the agency are fulfilled or because the relief that is sought is beyond his power to confer. *Salfi* suggested that under §405(g) the power to determine when finality has occurred ordinarily rests with the Secretary since ultimate responsibility for the integrity of the administrative program is his. But cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate. This is such a case.

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[10] If Eldridge had exhausted the full set of available administrative review procedures, failure to have raised his constitutional claim would not bar him from asserting it later in a district court See, *e. g. Flemming v Nestor*, 363 U.S. 603, 604, 607 (1960).

Eldridge's constitutional challenge is entirely collateral to his substantive claim of entitlement. Moreover, there is a crucial distinction between the nature of the constitutional claim asserted here and that raised in *Salfi*. A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a post-deprivation hearing. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 156 (1974). In light of the Court's prior decisions, see, *e. g.*, *Goldberg v. Kelly, supra; Fuentes v. Shevin, supra*, Eldridge has raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments.[11] Thus, unlike the situation in *Salfi*, denying Eldridge's substantive claim "for other reasons" or upholding it "under other provisions" at the post-termination stage, 422 U.S., at 762, would not answer his constitutional challenge.

We conclude that the denial of Eldridge's request for benefits constitutes a final decision for purposes of §405 (g) jurisdiction over his constitutional claim. We now proceed to the merits of that claim.[12]

III

A

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments. The Secretary does not contend that procedural due process is inapplicable to terminations of social security disability benefits. He recognizes, as has been implicit in our prior decisions, *e. g.*, *Richardson v. Belcher*, 404 U.S. 78, 80–81 (1971); *Richardson v. Perales*, 402 U.S. 389, 401–402 (1971); *Flemming v. Nestor*, 363 U.S. 603, 611 (1960), that the interest of an individual in continued receipt of these benefits is a statutorily created "property" interest protected by the Fifth Amendment. Cf. *Arnett v. Kennedy*, 416 U.S. 134, 166 (POWELL, J., concurring); *Board of Regents v. Roth*, 408 U.S. 564, 576–578 (1972); *Bell v. Burson*, 402 U.S., at 539; *Goldberg v. Kelly*, *supra*, at 261–262. Rather, the Secretary contends that the existing administrative procedures, detailed below, provide all the process that is constitutionally due before a recipient can be deprived of that interest.

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[11] Decisions in different contexts have emphasized that the nature of the claim being asserted and the consequences of deferment of judicial review are important factors in determining whether a statutory requirement of finality has been satisfied. The role these factors may play is illustrated by the intensely "practical" approach which the Court has adopted, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), when applying the finality requirements of 28 U.S.C. §1291, which grants jurisdiction to courts of appeal to review all "final decisions" of the district courts, and 28 U.S.C. §1257, which empowers this Court to review only "final judgments" of state courts. See, *e. g.*, *Harris v. Washington*, 404 U.S. 55 (1971), *Local No. 438 Construction & General Laborers Union v. Curry*, 371 U.S. 542, 549, 550 (1963); *Merchantile National Bank v. Langdeau*, 371 U.S. 555, 557–558 (1963); *Cohen v. Beneficial Indus. Loan Corp., supra*, at 545–546. To be sure, certain of the policy considerations implicated in §1257 and §1291 cases are different from those that are relevant here. *Compare General Laborers Union, supra*, at 550; *Mercantile National Bank, supra*, at 558, with *McKart v. United States*, 395 U.S. 185, 193–195 (1969); L. Jaffe, Judicial Control of Administrative Action, 424–426 (1965). But the core principle that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered remains applicable.

[12] Given our conclusion that jurisdiction in the District Court was proper under §405(g), we find it unnecessary to consider Eldridge's contention that notwithstanding §405(h) there was jurisdiction over his claim under the mandamus statute, 28 U.S.C. §1361, or the Administrative Procedure Act 5 U.S.C. §701 *et seq.*

This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Wolff v. McDonnell*, 418 U.S. 539, 557–558 (1974). See, *e. g.*, *Phillips v. Commissioner*, 283 U.S. 589, 596–597 (1931). See also *Dent v. West Virginia*, 129 U.S. 114, 124–125 (1889). The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). See *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Eldridge agrees that the review procedures available to a claimant before the initial determination of ineligibility becomes final would be adequate if disability benefits were not terminated until after the evidentiary hearing stage of the administrative process. The dispute centers upon what process is due prior to the initial termination of benefits, pending review.

In recent years this Court increasingly has had occasion to consider the extent to which due process requires an evidentiary hearing prior to the deprivation of some type of property interest even if such a hearing is provided thereafter. In only one case, *Goldberg v. Kelly*, 397 U.S. 254, 266–271 (1970), has the Court held that a hearing closely approximating a judicial trial is necessary. In other cases requiring some type of pretermination hearing as a matter of constitutional right the Court has spoken sparingly about the requisite procedures. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), involving garnishment of wages, was entirely silent on the matter. In *Fuentes v. Shevin*, 407 U.S. 67, 96–97 (1972), the Court said only that in a replevin suit between two private parties the initial determination required something more than an *ex parte* proceeding before a court clerk. Similarly, *Bell v. Burson*, 402 U.S. 535, 540 (1971), held, in the context of the revocation of a state-granted driver's license, that due process required only that the prerevocation hearing involve a probable-cause determination as to the fault of the licensee, noting that the hearing "need not take the form of a full adjudication of the question of liability." See also *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975). More recently, in *Arnett v. Kennedy*, 416 U.S. 134 (1974), we sustained the validity of procedures by which a federal employee could be dismissed for cause. They included notice of the action sought, a copy of the charge, reasonable time for filing a written response, and an opportunity for an oral appearance. Following dismissal, an evidentiary hearing was provided. *Id.*, at 142–146.

These decisions underscore the truism that " '[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers Local 473 v. McElroy*, 367 U.S. 886, 895 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Arnett v. Kennedy, supra*, at 167–168 (POWELL, J., concurring); *Goldberg v. Kelly, supra*, at 263–266; *Cafeteria & Restaurant Workers Local 473 v. McElroy, supra*, at 895. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action, second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, *e. g.*, *Goldberg v. Kelly, supra*, 263–271.

We turn first to a description of the procedures for the termination of Social Security disability benefits, and thereafter consider the factors bearing upon the constitutional adequacy of these procedures.

B

The disability insurance program is administered jointly by state and federal agencies. State agencies make the initial determination whether a disability exists, when it began, and when it ceased. 42 U.S.C. §421.[13] The standards applied and the procedures followed are prescribed by the Secretary, see §421(b), who has delegated his responsibilities and powers under the Act to the SSA. See 40 Fed. Reg. §4473.

In order to establish initial and continued entitlement to disability benefits a worker must demonstrate that he is unable

> "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. . . ." 42 U.S.C. §423(d)(1)(A).

To satisfy this test the worker bears a continuing burden of showing, by means of "medically acceptable clinical and laboratory diagnostic techniques," §423(d)(3), that he has a physical or mental impairment of such severity that

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[13] In all but six States the state vocational rehabilitation agency charged with administering the state plan under the Vocational Rehabilitation Act, 41 Stat. 735, as amended, 29 U.S.C. (Supp. III) §701 *et seq.*, acts as the "state agency" for purposes of disability insurance program. Staff of the House Comm. on Ways and Means, Report on the Disability Insurance Program, 93d Cong., 2d Sess., p. 148 (1974). This assignment of responsibility was intended to encourage rehabilitation contacts for disabled workers and to utilize the well-established relationships of the local rehabilitation agencies with the medical profession H. Rep. No. 1698, 83d Cong., 2d Sess., 23–24 (1954).

> "he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work." §423(d)(2)(A).[14]

The principal reasons for benefits terminations are that the worker is no longer disabled or has returned to work. As Eldridge's benefits were terminated because he was determined to be no longer disabled, we consider only the sufficiency of the procedures involved in such cases.[15]

The continuing eligibility investigation is made by a state agency acting through a "team" consisting of a physician and a nonmedical person trained in disability evaluation. The agency periodically communicates with the disabled worker, usually by mail—in which case he is sent a detailed questionnaire—or by telephone, and requests information concerning his present condition, including current medical restrictions and sources of treatment, and any additional information that he considers relevant to his continued entitlement to benefits. SSA Claims Manual (CM) §6705.1, Disability Insurance State Manual (DISM) §353.3.[16]

Information regarding the recipient's current condition is also obtained from his sources of medical treatment. DISM §353.4. If there is a conflict between the information provided by the beneficiary and that obtained from medical sources such as his physician, or between two sources of treatment, the agency may arrange for an examination by an independent consulting physician.[17] *Ibid.* Whenever the agency's tentative assessment of the beneficiary's condition differs from his own assessment, the beneficiary is informed that benefits may be terminated, provided a summary of the evidence upon which the proposed determination to terminate is based, and afforded an opportunity to review the medical reports and other evidence in his case file.[18] He also may respond in writing and submit additional evidence. *Id.*, §353.6.

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[14] Work which "exists in the national economy" is in turn defined as "work which exists in significant numbers either in the region where such individual lives or in several regions of the country." §423(d)(2)(A).

[15] Because the continuing disability investigation concerning whether a claimant has returned to work is usually done directly by the SSA Bureau of Disability Insurance, without any state agency involvement, the administrative procedures prior to the post-termination evidentiary hearing differ from those involved in cases of possible medical recovery. They are similar, however, in the important respect that the process relies principally on written communications and there is no provision for an evidentiary hearing prior to the cut-off of benefits. Due to the nature of the relevant inquiry in certain types of cases, such as those involving self-employment and agricultural employment, the SSA office nearest the beneficiary conducts an oral interview of the beneficiary as part of the pretermination process. SSA Claims Manual (CM) §6705.2(c).

[16] Information is also requested concerning the recipient's belief as to whether he can return to work, the nature and extent of his employment during the past year, and any vocational services he is receiving.

[17] All medical source evidence used to establish the absence of continuing disability must be in writing, with the source properly identified. DISM §353.4C.

[18] The disability recipient is not permitted personally to examine the medical reports contained in his file. This restriction is not significant since he is entitled to have any representative of his choice, including a lay friend or family member, examine all medical evidence. CM §7314. See also 20 CFR §401.3(a)(2). The Secretary informs us that this curious limitation is currently under review.

The state agency then makes its final determination, which is reviewed by an examiner in the SSA Bureau of Disability Insurance. 42 U.S.C. §421(c); CM §§6701 (b),(c).[19] If, as is usually the case, the SSA accepts the agency determination it notifies the recipient in writing, informing him of the reasons for the decision, and of his right to seek *de novo* reconsideration by the state agency. 20 CFR §§404.907, 404.909.[20] Upon acceptance by the SSA, benefits are terminated effected two months after the month in which medical recovery is found to have occurred. 42 U.S.C. (Supp. III) §423(a).

If the recipient seeks reconsideration by the state agency and the determination is adverse, the SSA reviews the reconsideration determination and notifies the recipient of the decision. He then has a right to an evidentiary hearing before an SSA administrative law judge. 20 CFR §§404.917, 404.927. The hearing is nonadversary, and the SSA is not represented by counsel. As at all prior and subsequent stages of the administrative process, however, the claimant may be represented by counsel or other spokesmen. §404.934. If this hearing results in an adverse decision, the claimant is entitled to request discretionary review by the SSA Appeals Council, §404.945, and finally may obtain judicial review. 42 U.S.C. §405(g); 20 CFR §404.951.[21]

Should it be determined at any point after termination of benefits, that the claimant's disability extended beyond the date of cessation initially established, the worker is entitled to retroactive payments. 42 U.S.C. §404. Cf. *id.*, §423(b); 20 CFR §§404.501, 404.503, 404.504. If, on the other hand, a beneficiary receives any payments to which he is later determined not to be entitled, the statute authorizes the Secretary to attempt to recoup these funds in specified circumstances. 42 U.S.C. §404.[22]

C

Despite the elaborate character of the administrative procedures provided by the Secretary, the courts below held them to be constitutionally inadequate, concluding that due process requires an evidentiary hearing prior to termination. In light of the private and governmental interests at stake here and the nature of the existing procedures, we think this was error.

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[19] The SSA may not itself revise the state agency's determination in a manner more favorable to the beneficiary. If, however, it believes that the worker is still disabled, or that the disability lasted longer than determined by the state agency, it may return the file to the agency for further consideration in light of SSA's views. The agency is free to reaffirm its original assessment.

[20] The reconsideration assessment is initially made by the state agency, but usually not by the same persons who considered the case originally. R. Dixon, Social Security Disability and Mass Justice 32 (1973). Both the recipient and the agency may adduce new evidence.

[21] Unlike all prior levels of review, which are *de novo*, the district court is required to treat findings of fact as conclusive if supported by substantial evidence. 42 U.S.C. §405(g).

[22] The Secretary may reduce other payments to which the beneficiary is entitled, or seek the payment of a refund, unless the beneficiary is "without fault" and such adjustment or recovery would defeat the purposes of the Act or be "against equity and good conscience." 42 U.S.C. §404(b). See generally 20 CFR §§404.501–404.515.

Since a recipient whose benefits are terminated is awarded full retroactive relief if he ultimately prevails, his sole interest is in the uninterrupted receipt of this source of income pending final administrative decision on his claim. His potential injury is thus similar in nature to that of the welfare recipient in *Goldberg*, see 397 U.S., at 263–264, the nonprobationary federal employee in *Arnett*, *see* 416 U.S., at 146, and the wage earner in *Sniadach*. See 395 U.S., at 341–342.[23]

Only in *Goldberg* has the Court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence:

> "The crucial factor in this context—a factor not present in the case of . . . virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits." 397 U.S., at 264 (emphasis in original).

Eligibility for disability benefits, in contrast, is not based upon financial need.[24] Indeed, it is wholly unrelated to the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards,[25] tort claims awards, savings, private insurance, public or private pensions, veterans' benefits, food stamps, public assistance, or the "many other important programs both public and private, which contain provisions for disability payments affecting a substantial portion of the work force. . . ." *Richardson v. Belcher*, 404 U.S., at 85–87 (Douglas, J., dissenting). See Staff of the House Comm. on Ways & Means, Report on the Disability Insurance Program, 93d Cong., 2d Sess., 9–10, 419–429 (1974) (hereinafter Staff Report).

As *Goldberg* illustrates, the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process. Cf. *Morrissy v. Brewer*, 408 U.S. 471 (1972). The potential deprivation here is generally likely to be less than in *Goldberg*, although the degree of difference can be overstated. As the District Court emphasized, to remain eligible for benefits a recipient must be "unable to engage in substantial gainful activity." 42 U.S.C. §423; 361 F.Supp., at 523. Thus, in contrast to the discharged federal employee in *Arnett*, there is little possibility that the terminated recipient will be able to find even temporary employment to ameliorate the interim loss.

As we recognized last Term in *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975), "the possible length of wrongful deprivation of . . . benefits [also] is an important factor in assessing the impact of official action on private interests." The Secretary concedes that the delay between a request for a hearing before an Administrative Law Judge and a decision on the claim is currently between 10 and 11 months. Since a terminated recipient must first obtain a reconsideration decision as a prerequisite to invoking his right to an evidentiary hearing, the delay between the actual cut-off of benefits and final decision after a hearing exceeds one year.

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[23] This, of course, assumes that an employee whose wages are garnished erroneously is subsequently able to recover his back wages.

[24] The level of benefits is determined by the worker's average monthly earnings during the period prior to disability, his age, and other factors not directly related to financial need, specified in 42 U.S.C. (Supp. III) §415 See *id.*, §423(a)(2).

[25] Workmen's compensation benefits are deducted in part in accordance with a statutory formula. 42 U.S.C. (Supp. III) §424a; 20 CFR §404.408; see *Richardson v. Belcher*, 404 U.S. 78 (1971).

In view of the torpidity of this administrative review process, cf. *id.*, at 383–384, 386, and the typically modest resources of the family unit of the physically disabled worker,[26] the hardship imposed upon the erroneously terminated disability recipient may be significant. Still, the disabled worker's need is likely to be less than that of a welfare recipient. In addition to the possibility of access to private resources, other forms of government assistance will become available where the termination of disability benefits places a worker or his family below the subsistence level.[27] See *Arnett v. Kennedy*, *supra*, at 169 (POWELL, J., concurring), *id.*, at 201–202 (WHITE, J., concurring in part and dissenting in part). In view of these potential sources of temporary income, there is less reason here than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.

D

An additional factor to be considered here is the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards. Central to the evaluation of any administrative process is the nature of the relevant inquiry. See *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 617 (1974); Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1281 (1975). In order to remain eligible for benefits the disabled worker must demonstrate by means of "medically acceptable clinical and diagnostic techniques," 42 U.S.C. §423(d)(3), that he is unable "to engage in any substantial gainful activity by reason of any *medically determinable* physical or mental impairment

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[26] *Amici* cite statistics compiled by the Secretary which indicate that in 1965 the mean income of the family unit of a disabled worker was $3,803, while the median income for the unit was $2,836. The mean liquid assets—*i.e.*, cash, stocks, bonds—of these family units was $4, 862; the median was $940. These statistics do not take into account the family unit's nonliquid assets—*i. e.*, automobile, real estate, and the like. Brief for Amici AFL–CIO/Green, at 25 n. 29, App. 4a.

[27] *Amici* emphasize that because an identical definition of disability is employed in both the Title II Social Security Program and in the companion welfare system for the disabled, Supplemental Security Income (SSI), compare 42 U.S.C. §423(d)(1) with *id.*, (Supp. III) §1382c(a)(3), the terminated disability-benefits recipient will be ineligible for the SSI Program. There exist, however, state and local welfare programs which may supplement the worker's income. In addition, the worker's household unit can qualify for food stamps if it meets the financial need requirements. See 7 U.S.C. §§2013(c), 2014(b), 7 CFR §271. Finally, in 1974 480,000 of the approximately 2,000,000 disabled workers receiving Social Security benefits also received SSI benefits. Since financial need is a criterion for eligibility under the SSI program, those disabled workers who are most in need will in the majority of cases be receiving SSI benefits when disability insurance aid is terminated And, under the SSI program, a pretermination evidentiary hearing is provided, if requested. 42 U.S.C. (Supp. III) §1383(e); 20 CFR §416.1336(c); 40 Fed. Reg. 1512; see Staff Report 346.

. . . ." §423(a)(1)(A) (emphasis supplied). In short, a medical assessment of the worker's physical or mental condition is required. This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter case, a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process. *Goldberg* noted that in such circumstances "written submissions are a wholly unsatisfactory basis for decision." 397 U.S., at 269.

By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon "routine, standard, and unbiased medical reports by physician specialists," *Richardson v. Perales*, 402 U.S., at 404, concerning a subject whom they have personally examined.[28] In *Richardson* the Court recognized the "reliability and probative worth of written medical reports," emphasizing that while there may be "professional disagreement with the medical conclusions" the "specter of questionable credibility and veracity is not present." *Id.*, at 405, 407. To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, is substantially less in this context than in *Goldberg*.

The decision in *Goldberg* also was based on the Court's conclusion that written submissions were an inadequate substitute for oral presentation because they did not provide an effective means for the recipient to communicate his case to the decisionmaker. Written submissions were viewed as an unrealistic option, for most recipients lacked the "educational attainment necessary to write effectively" and could not afford professional assistance. In addition, such submissions would not provide the "flexibility of oral presentations" or "permit the recipient to mold his argument to the issues the decision maker appears to regard as important." 397 U.S., at 269. In the context of the disability-benefits-entitlement assessment the administrative procedures under review here fully answer these objections.

The detailed questionnaire which the state agency periodically sends the recipient identifies with particularity the information relevant to the entitlement decision, and the recipient is invited to obtain assistance from the local SSA office in completing the questionnaire. More important, the information critical to the entitlement decision usually is derived from medical sources, such as the treating physician. Such sources are likely to be able to communicate more effectively through written documents than are welfare recipients or the lay witnesses supporting their cause. The conclusions of physicians often are supported by X-rays and the results of clinical or laboratory tests, information typically more amenable to written than to oral presentation. Cf. W. Gellhorn & C. Byse, Administrative Law—Cases and Comments 860–863 (6th ed. 1974).

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[28] The decision is not purely a question of the accuracy of a medical diagnosis since the ultimate issue which the state agency must resolve is whether in light of the particular worker's "age, education, and work experience" he cannot "engage in any . . . substantial gainful work which exists in the national economy . . . ." 42 U.S.C. §423(d)(2)(A). Yet information concerning each of these worker characteristics is amenable to effective written presentation. The value of an evidentiary hearing, or even a limited oral presentation, to an accurate presentation of those factors to the decisionmaker does not appear substantial. Similarly, resolution of the inquiry as to the types of employment opportunities that exist in the national economy for a physically impaired worker with a particular set of skills would not necessarily be advanced by an evidentiary hearing. Cf. K. Davis, Administrative Law Treatise §7.06 at 429 (1958). The statistical information relevant to this judgment is more amenable to written than to oral presentation.

A further safeguard against mistake is the policy of allowing the disability recipient or his representative full access to all information relied upon by the state agency. In addition, prior to the cut-off of benefits the agency informs the recipient of its tentative assessment, the reasons therefor, and provides a summary of the evidence that it considers most relevant. Opportunity is then afforded the recipient to submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file as well as the correctness of the agency's tentative conclusions. These procedures, again as contrasted with those before the Court in *Goldberg*, enable the recipient to "mold" his argument to respond to the precise issues which the decisionmaker regards as crucial.

Despite these carefully structured procedures, *amici* point to the significant reversal rate for appealed cases as clear evidence that the current process is inadequate. Depending upon the base selected and the line of analysis followed, the relevant reversal rates urged by the contending parties vary from a high of 58.6% for appealed reconsideration decisions to an overall reversal rate of only 3.3%.[29] Bare statistics rarely provide a satisfactory measure of the fairness of a decisionmaking process. Their adequacy is especially suspect here since the administrative review system is operated on an open-file basis. A recipient may always submit new evidence, and such submissions may result in additional medical examinations. Such fresh examinations are held in approximately 30% to 40% of the appealed cases, either at the reconsideration or evidentiary hearing stage of the administrative process. Staff Report 238. In this context, the value of reversal rate statistics as one means of evaluating the adequacy of the pretermination process is diminished. Thus, although we view such information as relevant, it is certainly not controlling in this case.

E

In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision. No one can predict the extent of the increase, but the fact that full benefits would continue until after such hearings would assure the exhaustion in most cases of this attractive option. Nor would the theoretical right of the Secretary to recover undeserved benefits result, as a practical matter, in any substantial offset to the added outlay of public funds. The parties submit widely varying estimates of the probable additional financial cost. We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial.

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[29] By focusing solely on the reversal rate for appealed reconsideration determinations *amici* overstate the relevant reversal rate. As we indicated last Term in *Fusari v. Steinberg*, 419 U.S. 379, 383 n. 6 (1975), in order fully to assess the reliability and fairness of a system of procedure, one must also consider the overall rate of error for all denials of benefits. Here that overall rate is 12.2%. Moreover, about 75% of these reversals occur at the reconsideration stage of the administrative process. Since the median period between a request for reconsideration review and decision is only two months, Brief for Amici AFL–CIO/Green, App. 4a, the deprivation is significantly less than that concomitant in the lengthier delay before an evidentiary hearing. Netting out these reconsideration reversals, the overall reversal rate falls to 3.3%. See Supplemental and Reply Brief for the Petitioner 14.

Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources, is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be found undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited. See Friendly, *supra*, at 1276, 1303.

But more is implicated in cases of this type than ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of the courts." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S., at 171–172. (Frankfurter, J., concurring.) All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard." *Goldberg v. Kelly*, *supra*, at 268–269 (footnote omitted), to insure that they are given a meaningful opportunity to present their case. In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of the social welfare system that the procedures they have provided assure fair consideration of the entitlement claims of individuals. See *Arnett* v. *Kennedy*, 416 U.S., at 202 (White, J., concurring and dissenting in part). This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final. Cf. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971).

We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process.

The judgment of the Court of Appeals is

Reversed.

Services by Miner

SECTIONS 402(d) and 413(b) (30 U.S.C. 902(d) and 923(b))—FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969 AS AMENDED—CLAIM FOR BLACK LUNG BENEFITS—SERVICES BY MINER AS "EMPLOYEE" PREREQUISITE FOR ELIGIBILITY

20 CFR 410.110, 410.201, and 410.214 SSR 76-24c

Johnson v. Weinberger, U.S.D.C., S.D., West Virginia, Civil No. 73-268 (5/2/74)

> Where claimant who worked in a chemical plant as a crusher operator preparing coal for chemical process, filed an application for benefits under the Federal Coal Mine Health and Safety Act of 1969, as amended, and was found to have pneumoconiosis, *held*, he is not entitled to Black Lung benefits because he was neither a coal miner nor an employee in a coal mine.

KNAPP, DISTRICT JUDGE:

This is an action under Section 205(g) of the Social Security Act, 42 U.S.C.A. §405(g) and Section 413(b) of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C.A. §9[illegible](b), to review a final decision of the Secretary of Health, Education and Welfare, which denied plaintiff's application for Black Lung benefits. This action is pending upon motions for summary judgment filed by both plaintiff and defendant pursuant to Rule 56(b), Federal Rules of Civil Procedure.

Plaintiff herein filed an application for benefits under the Federal Coal Mine Health and Safety Act of 1969 on April 1, 1971, alleging inability to work because of pneumoconiosis. On April 25, 1973, the Administrative Law Judge held that plaintiff was not entitled to benefits because he did not meet the definition "coal miner" as required by the Act. The Appeals Council affirmed the findings of the Hearing Examiner in a letter dated July 20, 1973. The plaintiff filed this action on September 13, 1973, seeking a review and reversal of the aforesaid decision.

The sole question before the Court for determination of this action is whether the Secretary's decision is supported by substantial evidence. That decision was based upon the Secretary's conclusion that plaintiff, while found to have the ailment complained of, was not entitled to black lung benefits because he never had an employer-employee relationship with any coal mine owner or operator and never was a coal miner in any of the nation's coal mines. Accordingly, it was the Secretary's decision that his pneumoconiosis did not arise out of coal mine employment. It is plaintiff's contention that the statute for black lung benefits is a remedial statute and therefore claimant is entitled to a liberal interpretation of the facts and the law.

Plaintiff worked for the Barium Reduction Corporation, a chemical plant which used coal mixed with other ores to produce its products. He was a member of the United Mine Workers Union, known as District 50. The chemical plant owned its own coal mine and the coal was mixed and shipped to the plant in South Charleston where plaintiff was employed. There, it was dried and pulverized to mix with other ores and then fed into the plant. Plaintiff operated a crusher which fed the pulverized coal into a conveyor belt that carried the coal through an underground tunnel into the plant.

In determining whether plaintiff's employment, as hereinbefore described, comes within the coverage of the Black Lung Act, an interpretation of the following provisions is necessary:

> *20 CFR §410.201 Conditions of entitlement; miner.*
>
> An individual is entitled to benefits if such individual:
>
> (a) Is a miner (see §410.110(j)); and
>
> (b) Is totally disabled due to pneumoconiosis (see Subpart D of this part); and
>
> (c) Has filed a claim for benefits in accordance with the provisions of §§410.220–410.234.
>
> *20 CFR §410.110 General definitions and use of terms.*
>
> For purposes of this part, except where the context clearly indicates otherwise, the following definitions apply:
>
> * * * *
>
> (h) "Coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, *and the work of preparing the coal so extracted*, and includes custom coal preparation facilities. (Emphasis supplied)
>
> * * * *
>
> (j) "Miner" or "coal miner" means any individual who is working or has worked as an employee in a coal mine, performing functions in extracting the coal or preparing the coal so extracted.
>
> * * * *
>
> *20 CFR §410.214 "Total disability" defined.*
>
> (a) A miner shall be considered totally disabled due to pneumonoconiosis if:
>
> (1) His pneumoconiosis prevents him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time (that is, "comparable and gainful work"; see §§410.424–410.426) and
>
> (2) His impairment can be expected to result in death, or has lasted or can be expected to last for a continuous period of not less than 12 months.
>
> * * * *

The Court having reviewed the evidence, concludes the Secretary's decision is supported by substantial evidence. Plaintiff's respriatory ailment was caused by his exposure to silicon-dioxide while working at a chemical plant where coal dust was a factor in processing. This work was separate and apart from actual coal mine work. While the chemical plant may own coal mines, plaintiff never went into any of these mines. As hereinbefore noted, he worked as a crusher operator at the chemical plant shovelling both ore and coal into a crusher, crushing it and then sending it over a conveyor into the mill. He also unloaded three or so carloads of bug dust coal a week which was brought into the plant in the Virginia Railroad cars. He had this employment for approximately 30 years.

While there is no question that plaintiff worked in an atmosphere which was filled with coal dust, the work he performed was not the preparation of coal, as contemplated by the applicable law and regulations. "Preparation of coal" relates to the preparation of coal brought out of the mine prior to its shipment and use in related commercial facilities. In the instant case, plaintiff did not prepare coal after extraction from the mine in order to ship it to a commercial use. He was, in fact, the employee of a commercial user. His job was preparation of the coal for peculiar use of his employer, Barium Reduction Corporation.

In any event, one of the requirements in addition to performing work of preparation of extracted coal was that the individual claiming black lung benefits be an employee of [1] a coal mine. 30 USC §902(d); 20 CFR §410.110(j). Barium Reduction Corporation, plaintiff's employer, is a plant which produces chemicals. It is not under the broadest interpretation of the word a coal mine. Accordingly, while the Court sympathizes with plaintiff, it does not believe that plaintiff has demonstrated himself to be an employee covered by the Black Lung Benefits Act of 1972. It is for the Congress to establish the limits of coverage and to correct any existing inequities in the Act.

Inasmuch as there is substantial evidence to support the decision of the Secretary, his decision must be upheld. *Wells v. Gardner*, 377 F.2d 533 (4th Cir. 1967).

In accordance with the foregoing, it is hereby ORDERED and ADJUDGED that defendant's motion for summary judgment be and the same is hereby granted.

All matters in this case in this court being concluded, the action shall be dismissed and retired from the docket.

Let the Clerk mail certified copies of this Memorandum Order to all counsel of record.

Definition of Miner

SECTION 402(d) (30 USC 902(d))—BLACK LUNG BENEFITS—DEFINITION OF MINER—OWNER OF CLOSE CORPORATION

20 CFR 410.110(h), (j), and (m) **SSR 76-25a**

An individual claiming black lung benefits had formed a close corporation which engaged in the general business of coal mining. He was the principal stockholder of the corporation and performed services for it in all capacities from president to laborer in the mines. *HELD*, since the sole stockholder of a close corporation may be considered to be an employee of the corporation, services which the claimant performed for the subject corporation established that he was an employee of such corporation and therefore a "miner" within the meaning of section 402(d) of the Federal Coal Mine Health and Safety Act of 1969, as amended.

The general issue before the Appeals Council is whether the claimant is entitled to black lung benefits. The specific issue is whether he is a "miner" as defined in section 402(d) of the Federal Coal Mine Health and Safety Act of 1969, as amended.

The claimant filed an application for black lung benefits on February 16, 1970. That claim has been heretofore denied on the basis that the claimant is not a "miner" within the meaning of section 402(d) of the Act, as amended, since all of his work in coal mines has been performed as a self-employed individual rather than as an "employee".

Section 402(d) of the Federal Coal Mine Health and Safety Act of 1969, as amended, provides that the term "miner" means any individual who is or was employed in a coal mine.

Section 410.110 of Social Security Administration Regulations No. 10 provides definitions of terms used in the Act:

> Subsection (h) provides, in pertinent part, that the term "coal mine" means an area of land used for the extraction of bituminous coal, lignite, or anthracite from its natural deposits in the earth and the work of preparing the coal so extracted.
>
> Subsection (m) provides that the term "employee" means an individual in a legal relationship (between the person for whom he performs services and himself) of employer and employee under the usual common-law rules. Sections (1) and (2) of subsection (m) provide as follows:
>
> "(1) Generally, such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the means by which that result is accomplished; that is, an employee is subject to the will and control of the employer not only as to what shall be done but how it is done. In this connection, it is not necessary that the employer actually direct or control the manner in which the ser-

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[1] The actual language of the statute and regulation is 'employee *in* a coal mine' (emphasis added). Thus, the Administration requires that a claimant be an employee and work in a coal mine, but does not require that he be an employee of a coal mine operator. Further, since the law, as amended, extends coverage to miners of surface and strip coal mining operations (in addition to miners who work on, at or below the surface of underground coal mines), the preposition "in" also includes employees who work *at* or *on* the surface of coal mines. (Editor's note.)

> vices are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common-law rules.
>
> (2) Whether the relationship of employer and employee exists under the usual common-law rules will in doubtful cases be determined upon an examination of the particular facts of each case."

According to the claimant's testimony, he first became connected with the coal mining industry in 1945 hauling coal for various firms as a self-employed truck driver. On March 20, 1951, the record shows that he formed a corporation, known as The XYZ Trucking Company, whose principal business activity was hauling coal. In addition, he performed these same services for the ABC Coal Company during the first six months of 1952. An itemized statement of earnings reported to his social security record indicates that the ABC Coal Company reported wages to that record in the first two quarters of 1952 and that The XYZ Trucking Company reported earnings to his record on a regular basis from 1953 through 1962 and again in the last quarter of 1970.

With respect to the above employers, the Appeals Council is of the opinion and so finds that the claimant's services in their employ did not constitute those of a "miner" within the meaning of section 402(d) of the Act, as amended. Section 410.110(j) of the Social Security Regulations No. 10 provides that the term "miner" means an individual who is working or has worked as an employee in a coal mine, performing functions in extracting the coal or preparing the coal so extracted. Insomuch as the claimant's services for The XYZ Trucking Company and the ABC Coal Company consisted of hauling coal after its extraction and preparation, such services would not qualify him as a "miner" within the meaning of the above cited section.

The record shows that on July 24, 1958, the claimant formed a corporation known as RST Coal Company, of which he was the principal stockholder. According to the Certificate of Incorporation, that corporation was formed in part, for the following reasons:

> "To purchase, lease or otherwise acquire, own and hold coal lands, land, real estate, minerals, timber and timber lands in the State and elsewhere; to open, operate and have coal mines and to mine coal by any method or means including deep mining, strip mining and auger mining in the State and elsewhere, and dispose of the products of such mines and such mining operations either at wholesale or retail and to conduct and carry on the general business of coal mining by any method or means and to do any and all things pertinent thereto, including the right to mine coal and operate coal mines for persons, firms and corporations * * * "

The claimant testified that RST Coal Company was engaged in strip mining operation.

It is permissible to find, under the usual common-law rules, that the owner of a close corporation is an 'employee.' The corporation has the legal status of a person. 1. *Fletcher Cyc Corp (Perm. Ed.)* §7. Generally, the corporation is considered the employer, not its stockholders. *Ibid,* §§14,25. The corporation is an entity distinct from its members even if only one person owns the entire capital stock. A sole owner and his corporation are distinct and separate legal entities and must be so treated. *Ibid,* §25,1. Thus, a sole stockholder employed by the corporation would be controlled and directed by the corporate person, not himself. Even if a person is the sole owner of a corporation, he may occupy a dual capacity as an executive officer and an employee of the company. 2. *Fletcher Cyc Corp (Perm Ed)* §266. For purposes of workmen's compensation acts, stockholders, directors and officers of corporations are not precluded from being considered employees of the company if otherwise serving in an employee capacity. *Ibid..* §266.1 Thus, assuming State law requirements have been adhered to with respect to corporate structure and operating procedures (i.e., a bona fide corporation exists) and an otherwise bona-fide employment relationship under the common-law rules exists between the individual and the corporation, a sole stockholder may be considered an 'employee' for purposes of the Act and regulations."

In the instant case, the claimant testified that he worked in every capacity for the RST Coal Company, from president of the corporation to the lowest labor job of excavating coal. He testified that, whenever there was physical work to be performed, he worked alongside of the employees he hired, and that he generally performed office work only at night and on weekends. Accordingly, since the record shows that RST Coal Company was a bona-fide corporation and was operated as such by the claimant, the Appeals Council is of the opinion and so finds that a bona-fide employment relationship under common-law rules existed between the claimant and the RST Coal Company; and, therefore, that the services performed by the claimant in the employ of that corporation constituted those of a "miner" within the meaning of section 402(d) of the Act, as amended. The record shows that RST Coal Company reported wages to the claimant's social security earnings record continuously from October 1, 1958 through December 31, 1961. This employment constitutes 3.25 years of coal mine employment by the claimant.

It is the decision of the Appeals Council that the claimant is a "miner" within the meaning of section 402(d) of the Federal Coal Mine Health and Safety Act of 1969, as amended.

Employment in Coke Yard

SECTION 411 (30 U.S.C. 921)—FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969—BLACK LUNG BENEFITS—EMPLOYMENT IN A COKE YARD NOT APPURTENANT TO A COAL MINE

20 CFR 410.110, 410.416 and 410.490 SSR 76-37c

Small vs. *Weinberger*, U.S.D.C., W.D. Pa., Civ. No. 75–101 (8/25/75)

Where claimant's entitlement to black lung benefits depended on whether his employment in coke yards some distance from the actual coal mine constituted employment "in the Nation's Coal Mines", *held*, Regulations No. 10, section 410.110, 20 C.F.R. § 410.110 defines "coal mine" as the land, structures and machinery used in extraction and preparation of coal, and since the coke yards in which claimant was employed did not involve extraction of coal and did not include coal preparation facilities appurtenant to the actual coal mine, claimant was not employed in the Nation's Coal Mines.

SNYDER, District Judge:

Plaintiff's complaint was filed on January 21, 1975, and constitutes an appeal from the decision of the Secretary of the United States Department of Health, Education and Welfare, holding that plaintiff was not entitled to black lung benefits under the Federal Coal Mine Health and Safety Act, 30 U.S.C. Section 921. Oral argument was set for May 9, 1975, but was canceled upon motion of counsel for the defendant, consented to by counsel for plaintiff.

The review of the record in the present action is somewhat difficult because the administrative law judge failed to make any findings on whether plaintiff has pneumoconiosis and, if so, whether he is totally disabled by pneumoconiosis. The findings were:

1. The evidence of record does not establish ten years of coal mine employment.
2. The claimant has failed to show that pneumoconiosis, if any, arose out of coal mine employment.

Since the defendant's brief admits that the results of two pulmonary function studies, on July 19, 1972 and January 29, 1973 meet the criteria established under the interim adjudicatory rules for a presumption of total disability due to pneumoconiosis,[1] and since the administrative law judge did not find that plaintiff was not totally disabled due to pneumoconiosis, it must be assumed that plaintiff is totally disabled due to pneumoconiosis, and the only question is whether there is substantial evidence to support the Secretary's findings that plaintiff did not establish the ten years of coal mine employment which would entitle him to the presumption, and that plaintiff's pneumoconiosis did not arise out of his coal mine employment.

The first relevant regulation is contained in the interim adjudicatory rules, 20 C.F.R. Section 410.490(b)(3):

> (3) With respect to a miner who meets the medical requirements in subparagraph (i) (ii) of this paragraph [which plaintiff does], he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment . . . if he has at least 10 years of the *requisite coal mine employment.* [emphasis added]

The regulations further provide, 20 C.F.R.:

> Section 410.416 Determining origin of pneumoconiosis, including statutory presumption.
>
> (a) If a miner was employed for 10 or more years in the Nation's coal mines, and is suffering or suffered from penumoconiosis, it will be presumed, in the absence of persuasive evidence to the contrary, that the pneumoconiosis arose out of such employment.[2]
>
> (b) In any other case, a miner who is suffering or suffered from pneumocon-

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[1] 20 C.F.R. Section 410.490(b) (1) (ii).

iosis, must submit the evidence necessary to establish that the pneumoconiosis arose out of employment in the Nation's coal mines. (See §§ 410.110 (h), (i), (j), (k), (l), and (m).

The other relevant regulations are the following:

20 C.F.R. Section 410.110

* * *

> (h) *'Coal mine' means an area of land* and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, *and other property*, real or personal, *placed upon, under, or above the surface of such land* by any person, *used in*, or to be used in, *or resulting from, the work of extracting in such area bituminous coal*, lignite, or anthracite *from its natural deposits in the earth* by any means or method, and the work of preparing the coal so extracted, *and includes custom coal preparation facilities.*
>
> (i) 'Underground coal mine' means a coal mine in which the earth and other materials which lie above the natural deposit of coal (overburden) is not removed in mining. *In addition to the natural deposits of coal in the earth, the underground mine includes all land, buildings and equipment appurtenant thereto.*
>
> (j) 'Miner' or 'coal miner' means any individual who is working or has worked as an employee in a coal mine, performing functions in extracting the coal or preparing the coal so extracted. (emphasis added)

While plaintiff's testimony during the hearing was somewhat vague, he testified that he had worked at various different mines as an underground coal mine operator for about 3½ to 4, or 5 to 5½ years; that he had worked at various different non mining jobs, such as casting iron, from 1937 until 1948; and that he had worked in various coke yards from 1925 to 1928 and from 1948 until 1951. He then worked at odd jobs unrelated to mining, such as construction labor, from 1951 to 1971, when he retired.

Plaintiff asserts that his employment in the coke yards should be considered employment "in the Nation's coal mines" to qualify him for the presumptions contained in 30 U.S.C. Section 921(c)(1); 20 C.F.R. 410.456(a); and 20 C.F.R. 410.490(b)(1)(ii). Defendant asserts that plaintiff's work in the coke operation is not coal mine employment within the meaning of the Act since it does not involve the "extraction or processing of coal." Neither party cites any cases and plaintiff cites only subdivisions (h), (i), and (j) of 20 C.F.R. Section 410.110. While it appears clear that plaintiff's work in the coke yard did not involve the "extraction" of coal, it is not clear whether it would be included under "custom coal preparation facilities," as mentioned in subdivision (h). While this phrase does not appear to have been explained, subdivisions (h) and (i) appear intended to include only the land, buildings, and equipment appurtenant to the actual coal mine. During the hearing plaintiff testified that the coal was hauled some distance from the mines to the coke yards. When he worked at one coke yard the coal was hauled from 10 or 12 miles away. When he was working at another coke yard the coal was hauled from different places. Therefore, plaintiff's employment in the coke yards was a step removed from the actual mining operations. Since Congress has not clearly included employment in coke yards as satisfying the requirement for coal mine employment, it does not appear that plaintiff is entitled to the presumptions available to miners with 10 years of coal mine employment. Further,

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[3] This regulation follows the requirements of the Act, 30 U.S.C. Section 921(c)(1).

since plaintiff asserts only that he is entitled to the presumptions and does not assert that he has established by other evidence that his pneumoconiosis arose out of employment in the Nation's coal mines, defendant's Motion for Summary Judgment is granted and the decision of the Secretary, denying plaintiff black lung benefits, is affirmed.

Conditions of Entitlement

SECTIONS 412(a)(5) (30 U.S.C. 922(a)(5))—FEDERAL COAL MINE HEALTH AND SAFETY ACT of 1969, AS AMENDED—BLACK LUNG BENEFITS—CONDITIONS OF ENTITLEMENT—PARENT'S BENEFITS

20 CFR 410.214, 410.380, and 410.395(h) SSR 76-38c

Emelett v. *Weinberger*, U.S.D.C., M.D. Pa., No. 74–801 (2/27/76)

> At the time of his death due to pneumoconiosis, a miner was survived by a parent who was living in a household with him for one year preceding his death. He was not survived by a widow or children. Although the parent received most of her support from the miner, she was not totally dependent upon him. *Held*, the surviving parent is not entitled to benefits because she must have been wholly dependent on the miner for her support in accordance with section 412(a)(5) of the Federal Coal Mine Health and Safety Act of 1969, as amended.

Nealon, U.S. District Judge:

The record in this action has been reviewed, pursuant to 42 U.S.C.A. § 405(g), to determine whether there is substantial evidence to support the Secretary's decision denying plaintiff's claim as the dependent mother of a miner for "black lung" benefits pursuant to the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C.A. § 901, et seq.

The miner, Bernard Emelett, died in 1968, at age 55. (TR. 20, 51). The Secretary does not dispute that plaintiff was the mother of the insured, that she was living in a household with him for one year immediately preceding his death, that the miner was not survived by a widow or children, and that his death was due to pneumoconiosis (Def. Br., p. 7). The only issue is whether the plaintiff was totally dependent on the miner for her support during the one year period preceding his death.

The record indicates that in the 12 month period prior to the miner's death, the plaintiff and the deceased miner lived in a home owned by plaintiff; that the miner had Social Security, State Workmen's Compensation and bank account interest income totalling $2,550.60 during that period; that plaintiff had Social Security and bank account interest income of $708.00 during that same period; and that these funds, totalling $3,258.60, were pooled for their mutual support. (TR. 87).

Plaintiff testified that the miner always turned over his entire pay, and later his entire benefits, to plaintiff and she would disburse these funds for their support. (TR. 21–22, 31–32). Plaintiff does not dispute that she used her own income for their mutual support. Indeed, the record indicates that plaintiff owned the house in which she and the miner resided during the 12 months prior to the miner's death (TR. 27, 81); that of the income she and her son received during that period, none was saved (TR. 81–82); and in her application, plaintiff admitted that she was "receiving over one half of my support from him but not all." (TR. 39). Instead, plaintiff argues that the "black lung" act should be liberally construed in favor of including under its coverage someone like plaintiff whose own income would be insufficient to maintain her. Plaintiff argues that the Secretary's interpretation of the Act, i.e., requiring a showing of "total dependency," would preclude one from receiving benefits where one received even an insignificant contribution of support from a person other than the miner. Plaintiff admits that she has no authority to support her contentions. (Pl. Br., pp. 4–5).

The provision permitting parents to qualify for benefits was added to the Act by the 1972 amendments. The Senate bill leading to the amendments permitted dependent parents, if there was no surviving widow or child, or dependent brothers and sisters, if there was no surviving dependent parent, to succeed to a miner's benefits provided that the parent, brothers or sisters, received at least one half of their support from the miner for at least a one year period prior to his death. The House bill contained no eligibility provisions for such persons. The House receded "with an amendment that provided that in order to qualify for benefits, parents, brothers and sisters must have been *wholly* dependent on the miner, and must have resided in the miner's household for one year prior to the miner's death." (Emphasis supplied). Conference Report 92–1048, U.S. Code Cong. & Adm. News, 92nd Cong., 2nd Session, 1972, p. 2338. The amendment, as enacted, defined "dependency" as meaning a *total* dependency of the parent, brother or sister. 30 U.S.C.A. § 922(a)(5)(2). The regulations follow this mandate. Social Security Regulations §§ 410.214, 410.380 and 410.395(h), 20 CFR. Since the record establishes that plaintiff was not "wholly" or "totally" dependent on the miner during the period in question, the Secretary's decision is supported by substantial evidence.

Accidental Death of Miner

SECTION 401 and 402(f) (30 U.S.C. 901 and 902(f))—BLACK LUNG BENEFITS—DEATH OF MINER DUE TO ACCIDENT—MINER REGULARLY AND GAINFULLY EMPLOYED
20 CFR 410.210, 410.414(b), 410.418, and 410.462 SSR 76–36c

Felthager v. *Weinberger*, USCA, 10th Cir., No. 75-1183 (2/6/76)

The miner worked for over 44 years in underground coal mines. At the time of his death in 1965, he was employed in a supervisory capacity as an assistant foreman in a coal mine, a position which he had held for 15 years. His death occurred when, exhausted from shortness of breath, he sat down on the shuttle car tracks and was run over by a shuttle car. His widow applied for black lung benefits under 30 U.S.C. § 901 et seq., claiming that the miner was totally disabled due to pneumoconiosis at the time of his death. *Held*, the fact of employment at the time of death does not preclude a finding of total disability, if, for example, the employment is sporadic or "make-work". However, since here the miner, at the time of his death, was performing his usual supervisory work and such work was of a substantial nature, the evidence is sufficient to support a finding by the Secretary that the miner was not totally disabled due to pneumoconiosis.

HILL, Circuit Judge:

This is another of the many recent cases in which the survivor of a deceased coal miner has sought judicial review of the denial of "Black Lung Benefits" provided in 30 U.S.C. § 901 *et seq.* Appellant, Marie L. Felthager, is the widow of Joseph Felthager who died in 1965 after working over 44 years in underground coal mines. A hearing before an administrative law judge resulted in a determination that appellant was entitled to benefits. On its own motion, the Appeals Council of the Social Security Administration reviewed the claim and denied benefts. This became the decision of the Secretary and appellant properly sought judicial review under 42 U.S.C. § 405(g). The district court found the Secretary's decision was supported by substantial evidence and granted summary judgment in favor of appellee.

Appellant meets all the personal eligibility requirements for a widow seeking benefits as stated in 20 C.F.R. § 410.210. The issues in this appeal concern whether she has proved the additional requirement that the deceased miner either (a) died of pneumoconiosis (black lung) or (b) was totally disabled due to pneumoconiosis at the time of his death. Benefits were denied on the grounds she had proved neither alternative. If the Secretary's decision is supported by substantial evidence, we must affirm the judgment. 42 U.S.C. § 405(g); *Richardson* v. *Perales*, 402 U.S. 389 (1971).

Proving death or total disability due to pneumoconiosis is not easy. To aid claimants with their difficult burden of proof, several presumptions have been included in the statutes and regulations. In this case, however, we are primarily concerned with only one of these presumptions. Appellant could not produce the medical evidence necessary to raise any of the presumptions contained in 20 C.F.R. §§ 410.418, 410.458, and 410.490. Neither could she establish the presumption of death due to pneumoconiosis under 20 C.F.R. § 410.462 because the miner's death was not "medically ascribed" to a chronic lung disease.[1] If appellant is to prevail it must be under the standards of 20 C.F.R. § 410.414 or § 410.454.

Section 410.414(b) provides:

> (1) Even though the existence of pneumoconiosis is not established as provided in paragraph (a) of this section [x-ray, biopsy or autopsy], if other evidence

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[1] Appellant argues the deceased's respirable disease should be considered the "proximate cause" of the deceased's accidental death. We do not believe § 410.462 allows speculation in problems of remote causation. When respirable disease is not an immediate cause of death, a claimant must establish an entitlement to benefits under alternative provisions of the regulations. *See* Farmer v. Weinberger, 519 F.2d 627 (6th Cir. 1975).

> demonstrates the existence of a totally disabling chronic respiratory or pulmonary impairment . . . , it may be presumed, in the absence of evidence to the contrary . . . , that a miner is totally disabled due to pneumoconiosis at the time of his death.

Section 410.454(b) raises the same presumption relative to finding the miner's death was due to pneumoconiosis.[2] Both sections provide the presumption "may be rebutted only if it is established that the miner did not have pneumoconiosis."

The Secretary found the evidence established that the deceased did not have pneumoconiosis and that he did not have any totally disabling respiratory impairment. We doubt whether there is substantial evidence establishing that the deceased did not have pneumoconiosis. However, we must affirm the judgment on the basis of the evidence of total disability. Because appellant has not shown the deceased was totally disabled due to chronic respiratory impairment, the presumption that the impairment was pneumoconiosis does not arise.

Appellant's husband died on July 28, 1965, one day before his sixty-first birthday. While working at his job as an assistant foreman at the Allen Mine in Weston, Colorado, the deceased became so exhausted from shortness of breath that he had to sit down. He sat on the shuttle car tracks and was run over by the car. He died a few hours later. The death certificate listed the immediate cause of death as a compound fracture of the left leg, fractured pelvis, and pulmonary edema.

There is no doubt the deceased miner suffered from severe respiratory impairment, beginning about 15 years before his death and growing continuously worse, especially during the last five years of his life. There was evidence from the deceased's wife and 12 of his co-workers that he suffered extreme breathing difficulties and coughed a lot; occasionally he would cough up phlegm with black streaks in it. Four doctors who had examined the deceased during his life had all concluded he had severe respiratory impairment which was possibly black lung or pneumoconiosis. One of them stated the deceased had black lung "without question."

The evidence the deceased did not have pneumoconiosis came from two doctors who examined an apparently inconclusive autopsy and found "there is no anatomic evidence of blacklung." One of them added "*From this information*, this patient did not have 'black lung' disease" (emphasis added). Neither doctor for the Secretary based his opinion on actual examination of the deceased. As we stated before, we do not decide the issue, but we doubt whether this could be considered substantial evidence establishing the nonexistence of pneumoconiosis. *See* Martin v. Secretary of Department of Health, Education & Welfare, 492 F.2d 905 (4th Cir. 1974); Landess v. Weinberger, 490 F.2d 1187 (8th Cir. 1974).

Concerning the issue of total disability, the evidence shows the deceased continued to work as an assistant mine foreman until his death. He had held the same position for 15 years, but had previously done all types of mine work. Although his duties consisted primarily of walking around the mine supervising other miners, he could do that only with great difficulty. He could not walk from one work site to another to check on the crews without stopping to rest and catch his breath. On one occasion he collapsed in the mine because he could not get his breath. On another occasion he passed out while attempting to mow his lawn. He had been advised by his doctor and his family to quit working in the mines. In spite of this, he kept working regularly because of financial need and because of his desire to reap full retirement benefits by working until the usual retirement age. At the time of his death there were no Social Security benefits for black lung disability.

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[2] The presumption applies when the miner has been employed in the Nation's underground coal mines for 15 or more years. 20 C.F.R. §§ 410.414(b) (3) and 410.454(b) (3). That is not in issue in this case since it is undisputed the deceased miner had worked in coal mines at least 44 years.

Whether this evidence establishes total disability must be determined under the definition contained in 30 U.S.C. § 902(f).

> The term "total disability" has the meaning given it by regulations of the Secretary of Health, Education, and Welfare, except that such regulations shall provide that *a miner shall be considered totally disabled when pneumoconiosis prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he previously engaged with some regularity and over a substantial period of time* . . . . (emphasis added).

The Secretary's regulations in 20 C.F.R. § 410.412(b) are in substantially identical terms.

Appellant would phrase the issue before us as follows: Can a miner be "totally disabled due to pneumoconiosis" as defined in the Act and regulations if he was employed in the mines at the time of his death? Appellant's question must be answered affirmatively, but that does not mean she is entitled to benefits on the basis of the evidence in this case. Under the statutory definition, the mere fact of employment does not preclude a finding of total disability. The circumstances of the employment may be consistent with a finding of total disability. Social Security Ruling 73–36 stated that a miner could be totally disabled and still be employed if the employment was characterized by "sporadic work, poor performance and marginal earnings." Ruling 73–36 has been followed in subsequent cases. *E.g.*, Farmer v. Weinberger, 519 F.2d 627 (6th Cir. 1975); Tibbs v. Weinberger, 401 F. Supp. 1139 (E.D. Ky. 1975). In addition, other cases have recognized a miner may have been employed and yet totally disabled due to pneumoconiosis if his job was a "make-work" position. Lawson v. Weinberger, 401 F. Supp. 403 (W.D. Va. 1975); Rowe v. Weinberger, 400 F. Supp. 981 (W.D. Va. 1975). In such circumstances a miner may have been given a job through the courtesy of the management even though he was no longer able to do work comparable to his usual mine employment.

Some cases similar to the one at bar have been remanded with directions for the administrative law judge to determine what the decedent's work performance actually was. Corridoni v. Weinberger, 402 F. Supp. 983 (M.D. Pa. 1975); Rowe v. Weinberger, *supra*; Dellosa v. Weinberger, 386 F. Supp. 1122 (E.D. Pa. 1974). In these cases the court found inadequate investigation and consideration by the administrative law judge of the circumstances of the deceased's employment. Appellant has not argued, however, that the factual inquiry was inadequate in this case, or that her late husband's employment would in fact satisfy either condition in which a miner may be employed and yet be totally disabled due to pneumoconiosis. Nothing in the evidence or the argument warrants an assumption on our part that appellant could show an entitlement to benefits under the above standards if we did remand.[3]

Appellant argues that by analogy to the facts in cases such as *Tibbs* and *Dellosa, supra,* this case should be reversed because her husband was disabled by respiratory impairment to a greater extent than the deceased miner in either *Tibbs* or *Dellosa.* He certainly could not do the physical labor he had done in past years. Unlike the miners in *Tibbs* and *Dellosa,* however, Mr. Felthager was an assistant foreman. Under the Act and our traditional concepts, disability is a subjective and individual condition. An impairment that means total disability for one person may not mean total disability for another. The regulations specifically provide for the consideration of age, education, and experience in determining total disability. 20 C.F.R. § 410.426. The facts in Lawson v. Weinberger, *supra,* are nearly identical to the present case. On this issue the court stated:

> There is no evidence of record to suggest that Mr. Lawson's last position of general mine foreman was of a "make-shift" variety. For almost a decade prior to his death, Mr. Lawson was employed in a supervisory capacity. . . . It appears that Mr. Lawson held the position of general mine foreman because of his obvious qualifications and skills. The fact that the deceased may not have been physically capable of doing manual labor does not alter the circumstance that his "usual work" was a supervisor. (401 F. Supp. at 405).

We believe this statement applies equally to Mr. Felthager.

Finally, appellant argues it is contrary to legislative intent to deny survivor's benefits when the deceased was totally disabled for all practical purposes, but through inordinate effort continued to work because of economic compulsion amounting to duress. She cites statements to this general effect made by congressmen during the hearings on the 1972 amendments to the Act. She also cites congressional statements, made since the amendments became effective, which indicate some congressmen's displeasure with the Secretary's harshness in administering the Act.

The 1972 amendments were clearly intended to make it easier for claimants to obtain benefits. Congress was concerned because benefits were being denied in over 50 percent of all claims and in 72 percent of the claims in some states. 1972 U.S. Code Cong. & Admin. News 2307. However, when the amendments came to conference, it appears the House feared the Senate Bill's definition of total disability was too liberal. The final word on the subject of legislative intent is contained in the Conference Committee Report. On this issue it states:

> The House receded on the understanding that under the Senate language it is not intended that a miner be found to be totally disabled if he is in fact engaging in substantial work involving skills and abilities closely comparable to those of any mine employment in which he previously engaged with some regu-

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[3] In cases similar to the present one, where "make-shift" or "sporadic" work was not a factor, the Secretary's finding that the deceased was not totally disabled has uniformly been upheld. *See* Farmer v. Weinberger, 519 F.2d 627 (6th Cir. 1975); Lawson v. Weinberger, 401 F. Supp. 403 (W.D. Va. 1975); Cox v. Weinberger, 389 F. Supp. 268 (E.D. Tenn. 1975); Rainey v. Weinberger, 388 F. Supp. 1277 (E.D. Tenn. 1975); England v. Weinberger, 387 F. Supp. (S.D. W. Va. 1974); Statzer v. Weinberger, 383 F. Supp. 1258 (E.D. Ky. 1974).

> larity and over a substantial period of time . . . .[4]

1972 U.S. Code Cong. & Admin. News 2339. Based on language of 30 U.S.C. § 902(f) and this statement of legislative intent, we cannot say it is contrary to the intent of Congress to deny benefits when the evidence shows the deceased was effectively performing his usual work at the time of his death. Farmer v. Weinberger, *supra* at 630–31.

Under the facts of this case, the denial of benefits because the deceased was employed may seem harsh. But the fact he was doing his usual work in the mines at the time of his death, if not conclusive, is at least substantial evidence in support of the Secretary's finding the deceased was not totally disabled due to pneumoconiosis. This finding must be allowed to stand.

AFFIRMED.

Annulment of Marriage

SECTION 402(e) (30 U. S. C. 902 (e))—FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969—BLACK LUNG BENEFITS—ANNULMENT OF MARRIAGE—VOID *AB INITIO*—VIRGINIA

20 CFR 410.210 and 410.211 SSR 76–15

> The claimant was receiving monthly widow's benefits under the Black Lung program. These payments were terminated when she remarried. Subsequently this marriage was annulled by the Virginia Courts. The decree neither granted permanent alimony nor reserved the right to grant it in the future. *Held*, such annulment decree rendered the marriage void *ab initio*, and the claimant's eligibility was reestablished from the month the decree was entered.

A question has been raised as to whether the claimant's remarriage was void *ab initio* under the law of Virginia.

The facts are as follows: the monthly black lung benefits of the wage earner's widow were terminated because of her remarriage in Virginia. On December 10, 1974, the Circuit Court in Virginia, declared claimant's marriage "now annulled on the grounds that complainant and defendant have not cohabited as man and wife, and that the aforesaid marriage has not been consummated." The decree neither granted permanent alimony nor reserved the right to the Court to grant permanent alimony in the future.

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[4] Although this statement certainly has some bearing on the issue before us, its importance should not be overestimated. The Conference Committee was not considering the same issue when it made the statement. Under the Act as originally passed in 1969, total disability was defined under the terms of 42 U.S.C. § 423(d)—"inability to engage in any substantial gainful activity." The Senate Committee found this standard unrealistic as applied to coal miners because they were often unsuited for or unable to find work outside the [illegible]. 1972 U.S. Code Cong. & Admin. News 2320–21. The Conference Committee statement of intent was in response to House questions which apparently concerned the effect of the new definition, relating the standard of disability specifically to mine work, or miners who quit work in the mines and applied for benefits, but did in fact find other comparable work.

No Virginia statute provides for annulment solely on the grounds stated in the annulment decree. *Cf* section 20–45 of the Code of Virginia (1973 Cum. Supp.).[1] Moreover, while a court of equity may grant an annulment on non-statutory grounds, *Pretlow* v. *Pretlow*, 177 Va. 524, 14 S.E. 2d 381, 387 (1941), courts cannot annul marriage in the absence of fraud, duress, or other improper elements affecting the marriage contract. *Jacobs* v. *Jacobs*, 184 Va. 281, 35 S.E. 2d 119, 126 (1945). To enter into a marriage contract with a preconceived intention not to perform natural incidents of the marriage relation is fraud. *Pretlow* v. *Pretlow*, *supra*. The allegation in the annulment decree may have been deemed sufficient to show that defendant never intended that the marriage be consummated and thereby perpetuated a fraud. We are unable to find any statutory provision dealing with the effective date of annulment decrees granted by courts of Virginia on non-statutory grounds.

It seems unlikely that the grounds stated in the decree were intended to allege mental or physical incapacity to consummate the marriage—the only statutory ground to which the allegations contained in the degree would be relevant. (See section 20–45, Code of Virginia, *supra*.[2]) Regardless of whether the grounds for claimant's annulment were statutory or non-statutory, the marriage was a void *ab initio*. Pursuant to the opinion of the Supreme Court of Appeals of Virginia in the *Pretlow* case, *supra*, a marriage induced by fraud is voidable, and not void. In the absence of any statutory provisions or cases dealing with the effective date of annulments granted by the courts of Virginia on grounds of fraud, the effect of annulment of a voidable marriage is to destroy the marriage *ab initio*. Also, in *Powell* v. *Celebrezze*, 1 Unempl Ins. Rep. ¶15,055 (1962–1963 transfer binder), the court noted that Virginia is a common law state and has recognized the common law doctrine of "relation back," in which a marriage that is voidable for causes that the statutes do not cover is void *ab initio* when annulled.

In *Powell*, the court held that the annulment of claimant's remarriage granted pursuant to section 20–45, *Code of Virginia 1950*,[3] was effective *ab initio* upon issuance of the annulment decree and that claimant was accordingly entitled to reinstatement of benefits terminated by the annulled remarriage. The court reached this holding despite the language of the statute, which is repeated in the statute as amended in 1964 and 1968:

> *Marriages which are void from time so declared or from time of conviction* . . . shall . . . be void from the time they shall be so declared by a decree of divorce or nullity, or from the time of the conviction of the parties. . . .

The court held that the wording of a statute to the effect that a marriage may be void from the time declared by the decree does not change the common law doctrine of "relation back" and does not make the marriage in question valid from the date it was contracted until the decree of nullity was entered.

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[1] This statutory provision was repealed by the Virginia legislature in 1975, Acts, 1975, chapter 644, and was replaced by a new section 20–45.1 (1975). The statutory revision would not change the analysis or the outcome of this Social Security Ruling under the given facts.

[2] *See* n. 1, *supra*.

[3] See n. 1, *supra*.

The Social Security Administration has taken the view that, except where the annulling court has the power to grant claimant permanent alimony in the annulment action, annulments granted pursuant to this and similar statutes should be considered operative *ab initio.* (See Social Security Ruling 65–19, CB 1965, P. 43.)

Thus, whether the claimant's annulment was granted on statutory or nonstatutory grounds, the marriage is void *ab initio.* Based upon Virginia authority, the reservation of power must be explicitly stated in the annulment decree.

Since the decree neither granted permanent alimony nor reserved the right to the court to grant permanent alimony in the future, claimant's eligibility was reestablished from the month the decree was entered. Claimant's benefits may be reinstated, and claimant should not be required to reapply.

Disability of Miner

SECTIONS 401, 402, and 411 (30 U.S.C. 901, 902 and 921)—FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969, AS AMENDED—BLACK LUNG BENEFITS—DISABILITY

20 CFR 410.400ff SSR 76–5c

Long v. *Weinberger*, USDC, Pa., Civil Action No. 74–970 (3/25/75)

> Where plaintiff is receiving social security disability benefits for total disability on account of several ailments, including a pulmonary impairment and paralysis from a stroke, but does not suffer from a respiratory or pulmonary impairment which, without consideration of his other impairments, would prevent him from returning to his former work in the coal mines, *held* plaintiff is not totally disabled due to pneumoconiosis.

Weber, District Judge

I. Recommendation

It is recommended that defendant's Motion for Summary Judgment be granted and that the decision of the Secretary of the Department of Health, Education and Welfare, denying plaintiff's application for benefits under the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, be affirmed.

II. Report

Plaintiff's complaint was filed on October 11, 1974, appealing the Secretary's denial of his application for black lung benefits.

The plaintiff has been receiving Social Security disability benefits under the Social Security Act[1] for a disability beginning on July 6,

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[1] 42 U.S.C. Sections 423 and 416(i).

1969, and there is no question that he is totally disabled. The critical question in the present action is whether plaintiff is totally disabled due to pneumoconiosis which he acquired as a result of his employment as a miner in the coal mines of the nation.[2] While both the Social Security Act [3] and the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972,[4] award benefits for disabled workers, the standards for determining disability under the two acts are quite different. Basically, the question in cases brought under the Social Security Act is whether the person is unable to engage in "*any* substantial gainful activity by reason of *any* medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." [5] The critical question in actions brought under the Federal Coal Mine Health and Safety Act is whether the miner is prevented from continuing his gainful mining employment because of pneumoconiosis which arose out of, or in connection with, his work in a coal mine.[6] The Senate report [7] discusses the fact that the nation's miners suffered from several handicaps in sustaining their burden of proving their disabilities under the Social Security Act. The Federal Coal Mine Health and Safety Act of 1969 was intended to remedy this. However, just a few years after enactment of that law, Congress found that miners who were in fact disabled were still being denied benefits because of their unique problems in producing medical evidence in support of their physical impairments resulting from pneumoconiosis. One of these problems was that the chest x-ray or roentgenogram was an imperfect means of ascertaining the existence of pneumoconiosis.[8] A negative x-ray was not positive proof of the absence of pneumoconiosis. Autopsies performed after chest x-rays had been read negative for pneumoconiosis indicated an error of 25 percent in diagnosis.[9] There was strong evidence that emphysema could cloud an x-ray to such an extent that the x-ray showed no concentrations of coal dust.[10] Further, the simple breathing test which measures only ventilatory capacity did not always adequately detect disabling respiratory or pulmonary impairment.[11] Miners had difficulties securing complete medical records and other evidence of their disability,[12] and they also encountered special problems in obtaining gainful employment outside of coal mining in Appalachia.[13] Therefore, the Act as amended gives miners the benefit of certain presumptions as follow:

1. If a miner who is suffering from pneumoconiosis was employed

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[2] 30 U.S.C. Section 921.

[3] 42 U.S.C. Section 423.

[4] 30 U.S.C. Section 921.

[5] 42 U.S.C. Section 423(d) (1) (A); 42 U.S.C. Section 416(i) (1) (A) (Emphasis added).

[6] See generally Senate Report, 1972 U.S. Code Cong. and Adm. News, 2305; and 30 U.S.C. Section 902(f).

[7] *Id.*

[8] *Id.* at 2313.

[9] *Id.* at 2314, 2316.

[10] *Id.* at 2316.

[11] *Id.* at 2317, 2310.

[12] *Id.* at 2318.

[13] *Id.* at 2313.

in coal mines for ten years or more, there is a rebuttable presumption that his pneumoconiosis arose out of such employment.[14] Whether or not the miner is suffering from pneumoconiosis is determined under the regulations. The alternative ways for a living miner to show that he is suffering from pneumoconiosis are to produce a chest x-ray [15] which meets the requirements of 20 C.F.R. 410.428(a) (1) and (b) or a biopsy [16] which meets the requirements of 20 C.F.R. 410.428(a) (3) and (c), or to establish the existence of a totally disabling chronic respiratory or pulmonary impairment through other relevant evidence such as blood gas studies, electrocardiogram, pulmonary function studies, physical performance tests, medical history, evidence submitted by the miner's physician, his spouse's affidavits, and other appropriate affidavits of persons with knowledge of his physical condition.[17] However, no claim for benefits filed on or before December 31, 1973,* can be denied solely on the basis of a negative chest roentgenogram.[18]

2. A miner who can produce an x-ray or biopsy report which satisfies the requirements of 30 U.S.C. Section 921(c) (3) is entitled to an irrebuttable presumption that he is totally disabled due to pneumoconiosis.

3. A miner who was employed in an underground coal mine for 15 years or more is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he can produce a negative chest x-ray and other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment.[19] Under the regulations,[20] the other evidence may be any of the following: the claimant's arterial oxygen tension is equal to or less than the specified values or he can show medical evidence of cor pulmonale with right-sided congestive failure;[21] or the claimant suffers from an impairment which is medically the equivalent of an impairment listed in the appendix;[22] or the claimant produces the results of a ventilatory study which satisfies the requirements set forth in the regulations;[23] or the claimant produces the appropriate results from a physical performance test;[24] or the miner establishes the existence of a totally disabling chronic respiratory or pulmonary impairment through

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[14] 30 U.S.C. Section 921(c) (1).

[15] 20 C.F.R. Section 410.414(a) (1).

[16] *Id.* at (2).

[17] 410.414(c).

[18] *Id.*

*Section 413(b) of the Act provides that claims under Part B of the Act shall not be denied solely on the basis of a negative chest X-ray. The general ending date for Part B claims is December 31, 1973. However, under section 414 of the Act, certain claims filed after December 31, 1973, are still claims under Part B. Thus, X-ray evidence in such claims is also subject to the limitation. [ED.]

[19] 30 U.S.C. Section 921(c) (4).

[20] 20 C.F.R. Section 410.414(b).

[21] The appendix following 20 C.F.R. 410.490 is incorporated in 20 C.F.R. 410.414(b) through Sections 410.422(c) and 410.424(a).

[22] 20 C.F.R. 410.424(b).

[23] 20 C.F.R. 410.426(b).

[24] 20 C.F.R. 410.426(c).

> other relevant evidence as discussed under the first alternative discussed above.[25]
>
> 4. Since plaintiff filed his claim before July 1, 1973, he is also entitled to the presumptions available under the Interim adjudicatory rules.[26] Under this regulation the x-ray must still meet the requirements of 20 C.F.R. 410.428 to establish the existence of pneumoconiosis. However, it may also be established by ventilatory studies meeting values which are higher than those set forth at 20 C.F.R. 410.426(b) if the miner was employed for at least ten years in underground or comparable coal mine employment.[27]

The question in the present case is not whether plaintiff can work—he clearly cannot. The question is whether he suffers from a respiratory or pulmonary impairment which, without consideration of his other impairments, would prevent him from returning to his former work in the mines.

The plaintiff was unable to come to his first hearing on May 4, 1972, because of his physical condition [28] but his attorney, Thomas A. Swope, was present and his wife, Sarah Long, and two of his former co-workers, Clarence Ritchey and Fred Stombaugh, testified in his behalf before Hearing Examiner Russell J. Blumenthal.

Mrs. Long testified that the plaintiff was born in 1907 and would be 65 on August 11, 1972 (Tr. 37). She did not know how far he had gone in school, although she knew he had not graduated (Tr. 38). He had worked as an underground coal miner and had also worked in the machine shop (Tr. 39). She thought he had worked underground about 15 or 16 years. She thought he had last worked underground around 1938 and had stopped working completely in 1969 because he was always short-winded and taking spells and he had a stroke (Tr. 40). When he came out of the mines because "he couldn't take it anymore" they sent him to school in Altoona for nine months so that he could work in the machine shop as a welder (Tr. 41). Toward the end of his work in the machine shop he had noticed that he was short-winded and could not even walk the length of the room. He could not go down the cellar steps without having to sit down on the steps and rest. Sometimes he couldn't make it to the garage (Tr. 42). He coughed and choked and spit up phlegm all the time. It was "white-looking" and he had not noticed any blood in it (Tr. [illegible]) At night he had to sleep propped up with several pillo[illegible] Durin[illegible] when he was working, before he had the stroke, he h[illegible]casion slumped at his machine. The only problem she had n[illegible] before his stroke was his trouble with his lungs. They had moved from a two-story house to one floor, on the recommendation of Dr. Perkins, who was deceased at the time of the hearing (Tr. 44). The plaintiff had taken medication for his heart but she was not sure whether he had taken any for his breathing. He once had to be given oxygen (Tr. 45).

When the plaintiff was working in the machine shop he was sent home sometimes because he would start to pass out (Tr. 46). He would gag and choke and be unable to get his breath.

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[25] 20 C.F.R. 410.414(c).

[26] 20 C.F.R. Section 410.490.

[27] 20 C.F.R. Section 410.490(b) (3).

[28] His wife testified he was paralyzed from a stroke (Tr. 43).

The plaintiff was hospitalized at Conemaugh Valley Hospital on four occasions, he was in the Weaver Hospital twice in 1960, and he was transferred from the Mercy Hospital in Pittsburgh to St. Mary's Hospital in Pittsburgh.

She testified that the plaintiff was unable to talk and that he coughs and chokes during the night. However, he could understand her sometimes (Tr. 48).

Another of plaintiff's witnesses was Clarence Ritchey, who testified he and the plaintiff had both worked in the C. A. Hughes Coal Company mine number two for six or eight years (Tr. 49). He did not know how long the plaintiff had continued to work there after he left in 1932. One of the plaintiff's jobs had been to take care of the generators. It was a very dusty job (Tr. 50).

Plaintiff's last witness was Fred Stombaugh, who testified he had known the plaintiff when he had worked in both the coal mines and the machine shop (Tr. 51). He thought plaintiff had worked in the coal mines for 16 years or more. They had worked together in the machine shop for a year or more in 1959 or 1960. He had noticed that the plaintiff was short of breath and short-winded (Tr. 52). "He was in awful bad shape." He frequently had fainting spells. Sometimes they would take him home from work.

A second hearing was held on March 27, 1974, before Administrative Law Judge Michael W. Ganzhorn. Plaintiff was again unable to attend because he was paralyzed from a stroke and was unable to speak (Tr. 56). Plaintiff was again represented by his attorney, Mr. Swope, and his wife; a former neighbor, Virginia Ritchie, and Fred Stombaugh testified in his behalf.

Plaintiff's wife, Mrs. Sarah Long, stated that plaintiff's paralysis resulted from a stroke he had undergone on the operating table in Mercy Hospital, Pittsburgh, in 1969 (Tr. 56). She testified that a man from the union had said plaintiff had worked underground in the mines from 1927 until sometime past 1938 (Tr. 59). When he was working in the mine he loaded dust, dug coal, and worked on the generators inside the mines. However, he had to come out of the mines because he was choking all the time and couldn't breathe (Tr. 60). He then went to school for nine months where he learned electric welding. After completing the schooling he got a job working at a machine company in Portage, where he worked from 1940 up to 1969. She testified that he was sick and was in and out of the hospital through all those years. She testified that Dr. Grokely [29] had treated the plaintiff for emphysema (Tr. 61). In 1962 he suffered a heart attack, followed by a stroke (Tr. 61—62). He went to the Rehabilitation Hospital for therapy but had to leave because he would get short of breath (Tr. 63). There was one occasion when the fire company had to bring oxygen into the home because of plaintiff's breathing. Mrs. Long testified that even when the plaintiff was working at Leeman Machine Shop she had noticed that when he would come home from work he would have to sit down on the porch before he could get in the house. Sometimes he would try to go down the cellar and she would have to bring him back (Tr. 64). Exhibit 9 (Tr. 85) was offered into evidence. It was a certificate by the Secretary of Local

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[29] The doctor's name is spelled phonetically in the transcript of the hearing and the record does not include any reports by him.

Union 935, dated September 4, 1970, and certified that Lester Long had worked in the mine as a coal loader from December 13, 1926, until the end of 1936, when he left the mines on account of poor health.

Under questioning by the Administrative Law Judge, Mrs. Long testified the plaintiff had smoked during the period he was working in the mines (Tr. 65). He had stopped working in the mines on December 31, 1936, because he was in poor health. He was working in the mines before they were married in 1931 or 1933 (Tr. 65).

Plaintiff's former neighbor, Mrs. Virginia Ritchie, testified that she lived about four blocks from the plaintiff and when she was at his house visiting she heard him coughing, choking, and spitting quite often (Tr. 68—69). She had been friends with plaintiff's daughter and she would frequently be at his house when he would come home from work. He would sit on the porch before coming into the house. After he came out of the mines he was very sickly. Mr. Fred Stombaugh testified that he had known plaintiff when he worked as a welder in the Leeman machine (Tr. 70). He had noticed that the plaintiff was short of breath and there were times when they would have to take him home. He thought that had occurred around 1956 and 1957. He had noticed that the plaintiff was short of breath and that it affected his work.

The review of the medical records in the present case is difficult because portions of some of them are illegible, although they are stamped "BEST COPY OBTAINABLE". The earliest record appears to be an x-ray from the Conemaugh Valley Memorial Hospital dated July 19, 1962.[30] (Tr. 111) This report concludes:

> No morphologic functional abnormalities were demonstrated by the swallowing function examination. There are . . . (illegible) signs of duodenitis unassociated with ulceration. No other abnormalities are demonstrated in the upper gastrointestinal tract, . . . (illegible).

The next report is dated January 12, 1967, and gives the following conclusion from the chest x-ray (Tr. 110):

> Mild interstitial fibrosis. Arteriosclerosis. Incidentally fairly prominent degenerative arthrosis is also identified in the lower thoracic spine particularly.

The discharge summary, apparently from Conemaugh Valley Memorial Hospital concerning plaintiff's stay from July 6, 1969, to July 17, 1969, gives the following final diagnosis (Tr. 89):

1. Transcient, right sided hemiparesis, etiology undetermined.
2. Cerebral arteriosclerosis.
3. Left myringitis.
4. Homonymous hemianopia, probably related to small cerebral thrombosis.

A chest x-ray on July 8, 1969, resulted in the following conclusion (Tr. 86):

> Mild senescent interstitial fibrosis and pulmonary emphysema. Arteriosclerosis. No other significant abnormalities are demonstrated in the chest.

The medical records from St. Francis General Hospital concerning plaintiff's stay from August 20, 1969, to September 16, 1969, are mostly illegible

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[30] Although the date and name of the hospital are illegible on the copy of the report, it appears to be one of the reports mentioned in Mr. Swope's letter of May 23, 1972, to Judge Blumenthal (Tr. 109).

(Tr. 92) but the report of Dr. Zimmerman includes no reference to any pulmonary impairments (Tr. 93).

The record includes two reports from Dr. Burkett, dated April 11, 1969, (Tr. 98) and November 7, 1969 (Tr. 96). The latter report stated that plaintiff required constant management by either his wife or the community nurse because of a stroke he suffered on July 6, 1969. His condition since discharge from St. Francis Hospital had been downhill. His condition was poor and his prognosis was unfavorable. However, the report makes no reference to any pulmonary impairments.

A chest x-ray taken on December 9, 1970, resulted in the following conclusion (Tr. 101):

> Mild senescent interstitial fibrosis and pulmonary emphysema. Arteriosclerosis. No other significant abnormalities are demonstrated in the chest. Classification O.

It is observed that under the regulations, Section 410.428(a)(1), the classification O is not accepted as evidence of pneumoconiosis.

A report of Dr. Plummer discloses that he saw the plaintiff in the Conemaugh Valley Memorial Hospital on January 23, 1971, after a fall at home with a fracture of the eighth rib. "Treatment consisted of pain medication and no strapping due to poor respiratory function." (Tr. 107)

Another x-ray report, dated August 12, 1972, resulted in a report identical to the one of December 9, 1970, except that the classification O was not mentioned (Tr. 112).

Plaintiff was readmitted to Conemaugh Valley Memorial Hospital on August 11, 1972, with complaints of right-sided weakeness, nausea, vomiting, and headache (Tr. 131) and stayed until August 26, 1972 (Tr. 126). Dr. Bastow's impressions at the time of admission were (Tr. 128):

1. Possible advancing cerebral vascular accident.
2. Possible generalized seizure disorder.

Dr. Bradley's impressions on August 12, 1972, were (Tr. 130):

1. Recent cerebral thrombosis with subsequent dysarthria and right arm and leg paralysis.
2. Status post previous cerebral thrombosis.
3. Probable old injury to the right knee with subsequent atrophy and weakness.
4. Obstipation.
5. Probable recurrent cystitis.
6. R/O extra-cranial occlusive arterial disease.

On February 27, 1973, plaintiff underwent ventilatory function tests (Tr. 116). However, the examiner reported that plaintiff did not understand the directions and failed to cooperate in performing the test. (Tr. 120) The evaluation of Dr. Harold I. Passes discloses that the studies depend in part on the cooperation and effort by the individual undergoing the tests and that at least three tests are required with no more than a 2 percent disagreement between the values from each test (Tr. 135). Since plaintiff had only one test, and since he was unable to understand the directions and to cooperate with the examiner, the test cannot be considered.

The report of Dr. Plummer, dated April 24, 1973, stated that his office had never treated plaintiff for respiratory impairment (Tr. 121).

A review of the evidence discloses that plaintiff worked in the underground coal mines in excess of ten years and that during the last few years of his work in the mines he had difficulty breathing, was short-winded, coughed and choked and spit up phlegm, had to sleep propped up with several pillows, and had fainting spells. The x-rays show that he suffered from mild interstitial fibrosis and pulmonary emphysema. He has not shown that he is entitled to any of the presumptions set forth in the Act and the regulations. While the record does indicate that he suffers from a pulmonary impairment, it cannot be said that it *establishes* that his pulmonary impairment prevents him from continuing his gainful mining employment. His severe impairment at the present time is his paralysis resulting from a stroke, for which he is receiving benefits under the Social Security Act.

A review of the evidence discloses there is substantial evidence to support the findings of the Secretary. Therefore, it is recommended that defendant's Motion for Summary Judgment be granted and that the decision of the Secretary, denying plaintiff's application for benefits under the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, be affirmed.

AND NOW *March 25, 1975* the above matter having been referred to the Magistrate for a report and recommendation, and the report and recommendation of the Magistrate having been filed on March 12, 1975, and no exception to said report and recommendation having been received, the recommendation of the Magistrate is hereby approved and adopted by this court and the motion of the defendant for summary judgment is hereby GRANTED, and the decision of the Secretary of Health, Education and Welfare be and is hereby AFFIRMED and the plaintiff's complaint be and hereby is DISMISSED.

Disability Due to Pneumoconiosis

SECTIONS 402(f) and 411(b) (30 U.S.C. 902(b) and 921(b))—FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969 AS AMENDED—TOTAL DISABILITY DUE TO PNEUMOCONIOSIS—APPLICABILITY OF INTERIM PRESUMPTION OF TOTAL DISABILITY

20 CFR 410.412 and 410.490(b) (1) (ii) and (3) SSR 76–6c
GRACE V. *WEINBERGER*, U.S.D.C., W.D., VA., C74–113–(A) (12/18/74)

Where an individual alleging disability due to pneumoconiosis meets the medical requirements established under the interim evidentiary rules and criteria of Social Security Administration Regulations No. 10, section 410.490(b) (1) (ii), but fails to establish that he has at least ten years of employment as a miner in the nation's coal mines as prescribed in section 410.490(b) (3), *held*, he may not rely upon the presumption of total disability due to pneumoconiosis arising under the interim criteria set forth in section 410.490, and disability must be established under the permanent criteria of sections 410.412–410.462.

Turk, District Judge:

Plaintiff has filed this action challenging the final decision of the Secretary of Health, Education and Welfare denying his claim for "black lung" benefits under the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* Jurisdiction is pursuant to §413(b) of the Act, 30 U.S.C. §923(b), which incorporates §205(g) of the Social Security Act, 42 U.S.C. §405(g). The sole issue to be decided by this court is whether the Secretary's decision is supported by "substantial evidence," and if it is, this court must affirm.

Plaintiff was born on February 8, 1906, and completed the sixth grade in school. In his application, he alleges that he has pneumoconiosis and that this condition arose out of his coal mine employment. Mr. Grace worked in the mines in the late 20's and early 30's for a period of about five years. He worked as a drillman under very dusty conditions. He thereafter worked as an automobile mechanic until his retirement in 1973.

The earliest medical report in the record is dated October 21, 1968, and is from Dr. George B. Setzler. He concluded that an x-ray of the plaintiff showed plueral (sic) effusion and pneumonitis left lower lung field.

Next plaintiff was examined by Dr. Kinser on October 31, 1968. Dr. Kinser interpreted an x-ray as showing questionable bronchitis, right lung root; fibrosis and emphysema, bilaterally. However, there was no evidence of pulmonary congestion or pulmonary edema.

Plaintiff was examined on December 3, 1971, by Dr. James W. Proffitt, a radiologist. Dr. Proffitt reported that an x-ray showed small opacities, category O/O.

Mr. Grace underwent pulmonary function studies on September 9, 1972, at Norton Community Hospital. His 1 second timed vital capacity was 2.25 liters and his maximum breathing capacity was 75.87 liters per minute. His height was listed as 67 inches and his cooperation was good.

Based on the results of the pulmonary function study, the Administrative Law Judge concluded that plaintiff's pulmonary disorder had progressed to such a level of severity that he was totally disabled as defined in the Act and Regulations. Specifically, he relied on 20 C.F.R. §410.490. Under §410.490 there is a rebuttable presumption of total disability where the ventilatory tests show a level of lung function equivalent to or less than the applicable values specified in the table in this section. For a man of plaintiff's height (67 ins) the values must be equal to or less than 2.3 and 92 liters FEV_1 and MVV respectively. (Plaintiff's studies showed 2.25 and 75.87 liters).

While the interim rules of §410.490 were designed to be more liberal than the permanent criteria set forth in §§410.412–410.462, they do, however, make this presumption of disability applicable *only* to miners with at least *10* years of coal-mining employment. In the present case, the evidence establishes that plaintiff worked only 5 years in the nation's coal mines, and therefore, he is not entitled to rely on the presumption in §410.490.[1]

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[1] The presumption referred to is that found in §410.490(b)(1)(ii) based on ventilatory study results. There is a presumption of total disability based on X-ray, biopsy or autopsy evidence of pneumoconiosis in §410.490(b)(1)(i). While in either subsection the impairment must be found causally related to coal miner employment (see §410.490(b)(2)), the presumption requiring at least 10 years of coal mine employment in §410.490(b)(3) refers only to ventilatory study results. [ED.]

[2] Entitlement to benefits would not, of course, necessarily follow. The plaintiff would still have to establish that the totally disabling pneumoconiosis arose from employment in the Nation's coal mines in accordance with section 410.416. [ED.]

Instead, he must establish totally disabling pneumoconiosis under the permanent criteria set out in §§410.412–410.462. If ventilatory studies show a breathing impairment of the level of severity specified in the table provided in §410.426(b), pneumoconiosis will be found to be disabling.[2] In this case, plaintiff's maximum voluntary ventilation (75.87 liters) and 1 second forced expiratory volume (2.25 liters) *exceed* those values specified in the aforementioned table (62 liters and 1.7 liters, respectively); accordingly, plaintiff has not established pneumoconiosis under this section. Likewise, plaintiff has failed to establish pneumoconiosis under any of the other permanent criteria, §§410.412–410.462.

The court is accordingly constrained to conclude that the Secretary's decision is supported by "substantial evidence" and must be affirmed. Therefore, summary judgment is granted in favor of the defendant.

HEALTH INSURANCE BENEFITS

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Duration of Spell of Illness

SECTION 1861(a) and (b)—HOSPITAL INSURANCE BENEFITS—DURATION OF SPELL OF ILLNESS—INPATIENT HOSPITAL SERVICES

20 CFR 405.110 **SSR 76-16**

This ruling supersedes SSR 70-25 (with the exception of the penultimate paragraph, this ruling is a reprint of SSR 70-25.)

> A hospital insurance beneficiary with several periods of hospitalization beginning March 13, had been discharged from the hospital on May 3 and was readmitted for treatment of the same condition on July 24. In the interim, on June 27, she reported to the hospital's outpatient clinic for treatment of an unrelated condition, but because of the doctor's delay, she was admitted to the hospital and was furnished 1 day of inpatient hospital care. *Held*, since she did not remain out of the hospital for a period of 60 consecutive days between her discharge on May 3 and the admission of July 24 as required by section 1861(a) of the Social Security Act, her readmission to the hospital on July 24 did not start a new spell of illness but was a continuation of the original spell of illness which began on March 13.

Section 1812(a) of the Social Security Act defining the scope of hospital insurance benefits, provides that an individual entitled to such benefits is eligible to have payment made on his behalf for up to 150 days[1] of inpatient hospital services during any spell of illness, defined as follows in section 1861(a) of the Act:

> ***a period of consecutive days—(1) beginning with the first day not included in a previous spell of illness (A) on which such individual is furnished inpatient hospital services or extended care services, and (B) which occurs in a month for which he is entitled to benefits under Part A, and

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[1] The beneficiary has 90 days coverage for inpatient hospital services in any spell of illness (benefit period); he also has a "lifetime reserve" of 60 additional days of inpatient hospital services on which he may draw after he has exhausted 90 days in a benefit period (unless he specifically elects not to use them).

(2) ending with the close of the first period of 60 consecutive days thereafter on each of which he is neither an inpatient of a hospital nor an inpatient of a skilled nursing facility.

R, a hospital insurance beneficiary, had several periods of hospitalization beginning in March 1969, as follows: March 13 through April 3, a period of 21 days; April 7 through May 3, 26 days; July 24 through August 23, 30 days. Between her discharge from the hospital in May and her readmission in July, R had to report to the outpatient department of the hospital to have a small growth removed. Because of unavoidable delay, the doctor could not attend to this matter on the day R reported, and advised her to stay overnight in the hospital, the night of June 27–28.

R's hospital bill contained a charge of $198, representing the coinsurance amount of $11 for each day beginning August 5, which was the 61st day of inpatient hospital services used by R in the spell of illness which had begun when she was first admitted to the hospital on March 13, 1969, according to the hospital's records.[3] R has protested the coinsurance charge, stating that her current spell of illness (benefit period) had actually begun on July 24, when she was readmitted to the hospital for a month's stay, and that no coinsurance amount was therefore due. The basis for this protest was that she did not consider the overnight stay in the hospital as inpatient care, and therefore it should not interrupt the out-of-hospital period of more than 60 days from her discharge on May 3 to her readmission on July 24.

The issue to be resolved here is whether a new spell of illness, as defined in section 1861(a) supra, began on July 24, 1969, with R's readmission to the hospital, or whether such readmission occurred within the initial spell of illness begun on March 13, 1969, so as to make R liable for payment of the coinsurance amount of $198 for which she was billed. This in turn depends on whether or not R was furnished services as an inpatient of the hospital on June 27.

Section 1861(b) of the Act provides, as pertinent here, that the term "inpatient hospital services" means the following items and services furnished to an inpatient of a hospital . . . by the hospital—

> (1) bed and board;
>
> (2) such nursing services and other related services, such use of hospital facilities, and such medical social services as are ordinarily furnished by the hospital for the care and treatment of inpatients, and such drugs, biologicals, supplies, appliances, and equipment, for use in the hospital, as are ordinarily furnished by such hospital. . . .
>
> excluding however—
>
> * * * *
>
> (4) medical or surgical services provided by a physician, resident,

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[3] Under section 1813 of the Act, a hospital insurance beneficiary is responsible for payment of a coinsurance amount for each day of inpatient hospital services used from the 61st through the 90th day during any spell of illness (benefit period). With respect to a spell of illness beginning in 1969, any payment made under the program on behalf of a hospital insurance beneficiary is subject to reduction as follows: a deductible of $44, a coinsurance amount of $11 for each day from the 61st through the 90th day of covered inpatient hospital services used, and a coinsurance amount of $22 for each reserve day used from the 91st through the 150th day during that spell of illness.

> or intern; and
>
> (5) the services of a private-duty nurse or other private-duty attendant.

* * * *

The file contains the following statement from R's physician:

> During the interval between her dismissal of May 3, and her readmission on July 24, she developed a small growth on the neck, and was advised to have it removed in the outpatient department (6/27) of [S] Hospital. Due to unavoidable delays on my part it was quite late before I was able to attend to the removal of this growth, and for this reason I advised her to remain in the hospital overnight. There was nothing in her condition which would have necessitated her remaining in the hospital. This overnight stay was strictly on the basis of the lateness of the hour.

The evidence in this case, which is not in dispute, also shows that R was in fact admitted to the hospital for the one day in question. While it is true that the physician stated that the services rendered were originally scheduled to be performed in the hospital's outpatient department and that R's admission to the hospital for an overnight stay was due to the lateness of the hour, R was in fact admitted to the hospital and received one day of inpatient hospital care. The fact that the inpatient services received were either covered or excluded from coverage is irrelevant in the determination of whether or not they would serve to extend the spell of illness. It is only relevant that the beneficiary was admitted as an inpatient.

Since R's stay in the hospital beginning June 27 was as an inpatient receiving inpatient hospital services, it is *held* that a new spell of illness did not begin with her readmission to the hospital on July 24, since there had not elapsed a period of 60 consecutive days in the initial spell of illness (which began March 13) on each of which she was not an inpatient of a hospital, as required by section 1861(a) of the Social Security Act. *Held further*, since only one spell of illness is involved, beginning March 13, R is responsible for payment of the coinsurance amount of $198 for which the hospital billed her, representing $11 for each day beginning with the 61st day of inpatient hospital services used by R in that benefit period.

Emergency Services

SECTION 1814(d) (42 U. S. C. 1395f(d))—HOSPITAL INSURANCE BENEFITS—EMERGENCY SERVICES

20 CFR 405.152(b), 405.191 and 405.192 SSR 76-17c

Pigford v. *Mathews*, USDC Southern Dist: Miss., Civil Action No. 1584(N) (8/14/75)

The claimant was admitted to a nonparticipating hospital for treatment of a fractured knee with surgery being performed 2 days later. No services were performed to prevent death or serious impairment of the health of the claimant upon admission to the hospital and the claimant could have been transferred to a participating hospital a day or two later when a medicare bed became available. In order to determine that emergency services were rendered the Secretary must find (1) that the patient's state of injury or disease is such that a health or life-endangering emergency existed with regard to the claimant's condition and, (2) that diagnosis or treatment was given at the most accessible hospital available and equipped to render such services. *Held*, reimbursement for the services performed by the non-participating hospital is precluded by section 1814 (d) of the Social Security Act since the services were found not to be covered emergency services as defined in 20 CFR § 405.152 (b).

NIXON, DISTRICT JUDGE:

This suit is brought pursuant to Section 1869(b) of the Social Security Act, 42 U.S.C. 1395ff(b) by Edith C. Pigford (hereinafter referred to as Claimant) to review a final decision of the Secretary denying her claim for payment for alleged emergency services furnished her by Jeff Anderson Memorial Hospital, Meridian, Mississippi, a nonparticipating hospital under the program of health insurance benefits of Title XVIII of the Act (also known as Medicare) during the period of her confinement from August 7, 1968 through October 4, 1968. This Court has justification under the above section, which provides for a judicial review of a final decision of the Secretary as to the amount of benefits payable under Part A of Title XVIII, with the jurisdictional requirement that the amount in controversy is $1,000.00 or more.

The Claimant entered Jeff Anderson Memorial Hospital in Meridian, Mississippi, a nonparticipating institution in the Medicare program, on August 7, 1968 and remained through October 4, 1968. The total charges incurred for her were $2,765.40. She was admitted for treatment of a broken knee cap. Coverage was denied on the ground that the hospital services furnished to the Claimant were not emergency services as required under Section 1814(d) of the Act, 42 U.S.C. 1395f(d) for a nonparticipating hospital.

Reconsideration was requested and coverage was again denied. The Claimant requesting a hearing before a hearing examiner, which was held on December 4, 1969 and on December 23, 1969 the hearing examiner concluded that the services did not constitute emergency services and affirmed the previous decision of the administration. The Claimant filed a request for a review before the Appeals Council and the Appeals Council declined review of the hearing examiner's decision on September 10, 1970.

The Claimant then sought review before this Court and by an order filed in this cause on June 16, 1971 the case was remanded to the Secretary for further hearing. The supplemental hearing was held on September 28, 1971 and on October 22, 1971 the hearing examiner recommended to the Appeals Council a finding that the services performed on behalf of the Claimant were not emergency services and that the Claimant was not entitled to Medicare payment. The Appeals Council adopted the findings and conclusions in the hearing examiner's decision, with one minor change, not pertinent to this decision, and is now before this Court again for review.

The operative facts are as follows. On August 7, 1968, the Claimant was hospitalized at Jeff Anderson Memorial Hospital with a fractured knee. On the day of the admission, the Claimant, according to the physical examination taken at that time, was well-developed, well-nourished and in no acute pain with normal pulse and respiration and blood pressure of 160/70. Admission to the nonparticipating hospital was made because her physician certified that the Claimant required emergency services to prevent her death or serious impairment of her health and there was no vacancy at the three other Medicare participating hospitals in Meridian, Mississippi. The Claimant was operated on two days after admission to the hospital and after a two month stay was finally released on October 5, 1968.

At the supplemental hearing held on September 28, 1971, affidavits were submitted and testimony taken. Dr. Med Scott Brown, the Claimant's physician, certified that she personally contacted the participating hospitals in the area and determined there was no room available; that after making this determination it was her medical opinion that the Claimant was in an emergency situation and it would have been a serious threat to the Claimant's health to require her to be moved from Jeff Anderson Memorial Hospital to a distant hospital, *outside the area of Meridian, Mississippi* (Emphasis supplied)

Dr. William L. Thornton, the operating physician, certified that he performed an operation on the Claimant's right tibia on August 9, 1968 and that, based on his consultation with Dr. Med Scott Brown and his examination of the Claimant, it would have been a serious threat to Claimant's health to have moved her from the nonparticipating hospital to a Medicare participating hospital.

Dr. Wildridge C. Thompson testified at the supplemental hearing as a medical advisor. He stated that on August 7, 1968, the date the Claimant was hospitalized and two days before the surgery was performed, she could have been transferred to a participating hospital within Meridian without hazard. He further testified that, after surgery, there would have been a period of from one to two weeks when a transfer would not have been advisable. Dr. Thompson further testified that her condition was one which had to be attended to within two or three days but not within two or three hours following her admission and it would not have endangered the life of the Claimant or materially have worsened her condition for her to be transferred prior to the operation on her knee.

There were also statements from the three Medicare participating hospitals in Meridian, Mississippi to the effect that a bed was available in each of said institutions on August 7 and August 8, 1968 and a Medicare patient would have been accepted.

The sole issue before this Court is whether the Claimant is entitled to hospital insurance benefits under the Act for emergency services. In order for her to be entitled to reimbursement, a medical emergency must have existed in the instant case, since she was taken to, and treated at, a nonparticipating hospital [Section 1814(d) of the Act, 42 U.S.C. 1395f(d)]. The term emergency services is defined in Section 405.152(b) of the Regulations of the Social Security Act as "those inpatient hospital services * * * which are necessary to prevent the death or serious impairment of the health of the individual, and which, because of the threat to the life and health of the individual, necessitate the use of the most accessible hospital (see Section 405.192) available and equipped to furnish such services * * *." Section 405.192 sets forth rules for use in making a finding of whether the services performed are emergency services. The Regulation notes that time is a crucial factor and the patient must ordinarily receive hospital care as soon as possible. In this case, the Claimant was not operated on until two days after her admission and this Court cannot hold that the services rendered come within the definition of emergency services.

The scope of judicial review of the Secretary's decision is narrowly limited to the issue of whether fact determinations are supported by substantial evidence. 42 U.S.C. 405(g); *Hayes v. Celebreezze*, 311 F.2d 648 (5 Cir. 1963); *Richardson v. Richardson*, 437 F.2d 109 (5 Cir. 1970) and *Burdett v. Finch*, 425 F.2d 687 (1970). Even if this Court, hearing the same evidence *de novo*, might have held otherwise, the findings of the Secretary are conclusive if supported by substantial evidence. *Robinson v. Celebrezze*, 326 F.2d 840 (5 Cir.), *cert. den.* 379 U.S. 851 (1964); *Brown v. Celebrezze*, 347 F.2d 227 (5 Cir. 1964). Credibility findings as to any conflicts in the evidence are to be made by the Secretary and not by the trial court. *Celebrezze v. Zimmerman*, 339 F.2d 496 (5 Cir. 1964); *Stillwell v. Cohen*, 411 F.2d 574 (5 Cir. 1969).

After a careful review of the records, this Court is of the opinion that the findings of the hearing examiner, as recommended to the Appeals Council and adopted by it, are supported by substantial evidence and that the proper legal standards were applied.* The decision of the Secretary is therefore affirmed and this motion for summary judgment on behalf of the Secretary of Health, Education and Welfare is granted.

*The court implicitly accepted, as supported by substantial evidence, the resolution by the hearing examiner and Appeals Council of conflicting testimony regarding the availability of beds in participating hospitals in favor of the Secretary. (Ed.)

Reasonable and Necessary Services

SECTIONS 1814(a)(3), 1861(b), 1861(e), and 1862(a)(1) (42 U.S.C. 1395f(a)(3), 1395x(b) and (e), and 1395y (a)(1))—HOSPITAL INSURANCE BENEFITS—REASONABLE AND NECESSARY SERVICES—TEAM APPROACH IN REHABILITATION SERVICES

20 CFR 405.310(g) and 405.310(k) SSR 76-26a

(With the exception of the deletion of references to reevaluation, this is a reprint of SSR 74-34a(89).)

> Where following a cerebrovascular accident with right hemiplegia and aphasia, claimant for hospital insurance benefits required and received as an inpatient of a rehabilitation hospital intensive rehabilitation services requiring a multi-disciplinary coordinated team approach to upgrade her ability to function as independently as possible, *held*, payment may be made since such services were required to be given on an inpatient hospital basis and were therefore reasonable and necessary for treatment of claimant's illness.

W, the claimant, was admitted to Hospital A on September 23, 1970, with a sudden onset of aphasia and right-sided hemiplegia, and remained there during the acute period of her illness. On October 19 she was transferred to X Rehabilitation Hospital where she remained until discharged on December 19, 1970.

At issue is whether payment may be made on W's behalf for the services furnished her by the X Rehabilitation Hospital for the period October 19, 1970, to December 19, 1970. The specific issue is whether it was medically necessary for her to receive treatment or diagnostic study as an inpatient in a hospital.

Section 1814 of the Social Security Act provides in part:

> (a) Except as provided in subsection (d), payment for services furnished an individual may be made only to providers of services which are eligible therefor under section 1866 and only if—
>
> * * * *
>
> (3) with respect to inpatient hospital services . . . which are furnished over a period of time, a physician certifies that such services are required to be given on an inpatient basis for such individual's medical treatment, or that inpatient diagnostic study is medically required and such services are necessary for such purpose . . .

Section 1861(b) of the Act defines the term "inpatient hospital services" as the following items and services furnished to an inpatient of a hospital and by the hospital—

> "(1) bed and board;
>
> "(2) such nursing services and other related services, such use of hospital facilities, and such medical social services as are ordinarily furnished by the hospital for the care and treatment of inpatients, and such drugs, biologicals, supplies, appliances, and equipment, for use in the hospital, as are ordinarily furnished by such hospital for the care and treatment of inpatients; and
>
> (3) such other diagnostic or therapeutic items or services, furnished by the hospital, or by others under arrangements with them made by the hospital, as are ordinarily furnished to inpatients either by such hospital or by others under such arrangements;

Section 1861(e) of the Act defines the term "hospital" as an institution which—

> (1) is primarily engaged in providing, by or under the supervision of physicians, to inpatients (A) diagnostic services and therapeutic services for medical diagnosis, treatment, and care of injured, disabled, or sick persons, or (B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons;

Upon admission to X Hospital, the physical examination rendered an impression of cerebrovascular accident with right hemiplegia, aphasia, and hypertention. On October 22 W was examined by a member of the hospital's Department of Physical Medicine and Rehabilitation. His general findings show that she was totally aphasic with poor trunk balance and rightsided hemiplegia with right facial palsy.

Her first speech therapy evaluation was done October 23, 1970. The therapist felt prognosis for return of functional language was poor; however, she felt a trial period of therapy was warranted because of the inconsistent comprehension and the recent occurrence of the cerebrovascular accident. The claimant was scheduled for daily speech therapy and responded well to the first week of therapy. It is noted that at the time of evaluation her speech was usually limited to "yeh," but at the end of the first week, she was able to read words aloud and repeat a sentence although there were articulation errors. A marked change in alertness and general physical condition after 2 weeks of therapy suggested a need for reevaluation. This was done November 10 and 11, and she showed improvement in auditory comprehension and increased verbalization.

The initial physical therapy evaluation shows the claimant needed much assistance in wheelchair management. She could come to a standing position in the parallel bars with assistance but required the assistance of two people to ambulate on them. Her balance in a standing position was only fair, which appeared to be related to muscle weakness rather than a real balance problem. A continued program of gait training was instituted. The physical therapy discharge summary indicates the claimant received physical therapy from October 21 to December 18, 1970, consisting of tilt table and progressing to ambulation. At the time of discharge, she ambulated up to 40 feet with the aid of a four-pronger cane and supervision. She required some assistance ascending and much assistance descending stairs. Difficulty getting out of her wheelchair persisted, but she could accomplish this with assistance.

An occupational therapy self-care evaluation was done on October 22, 1970. Her level of performance indicated almost total dependence; however, a self-care program including wheelchair transfers, eye-hand coordination, passive range of motion and active exercises where needed was instituted. Slow but steady progress was noted on November 3. In addition, the claimant expressed a desire to look better; therefore, it was decided to have her begin work on make-up application. By November 18 she could ambulate in physical therapy with the aid of a walker and moderate assistance. By December 10 she still needed assistance with dressing upper and lower extremities, but wheelchair transfers had improved. The occupational therapy discharge summary indicates the claimant had become capable in feeding herself, she required supervision in grooming and bathing, she could dress herself for the most part, and she needed supervision in wheelchair transfer.

A patient is considered to require a hospital level of inpatient care if he needs a relatively intensive rehabilitation program consisting of a multidisciplinary coordinated team approach to upgrade his ability to function as independently as possible. A program of this scope usually includes intensive skilled rehabilitation nursing care, physical therapy, occupational therapy and, if needed, speech therapy. Upon admission, an assessment should be made of the patient's medical condition, attitude toward rehabilitation, functional limitations and prognosis. A decision should then be made whether rehabilitation is possible, what reasonable goals are, and how these goals are to be achieved. There need not be an expectation of the attainment of complete independence in the activities of daily living but there must be an expectation of an improvement that would be of a practical benefit to the patient.

It is noted that the claimant spent 26 days at the initial hospital where she was treated during the acute stage of her illness due to a cerebrovascular accident which resulted in right hemiparesis and aphasia. The attending physician felt the claimant was a good candidate for rehabilitation as evidenced by his certification and recertification, and his statement dated September 20, 1971. He had the claimant transferred to the X Rehabilitation Hospital for specialized rehabilitation care. It was his

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Judicial Review

SECTION 1869(b) (42 U.S.C. 1395ff(b))—HOSPITAL INSURANCE BENEFITS—RIGHT TO JUDICIAL REVIEW—CONTESTED AMOUNT LESS THAN $1000

20 CFR 405.730

Rubin v. *Weinberger*, 524 F.2d 497 (7th Cir. 1975) SSR 76-39c

The claimant, having been hospitalized from June 11 through July 17, 1971, sued to recover $722 in hospital insurance benefits. The initial determination of the Secretary denied claimant $1,130.12 in hospital benefits for the period from July 1 to July 17. On appeal the Administrative Law Judge allowed 6 additional days of hospital insurance benefits, amounting to $408. Subsequently, the Appeals Council denied further review. Claimant then sought judicial review in a United States district court, which dismissed the action for lack of jurisdiction, determining the amount in controversy to be less than $1,000. On appeal, the Court of Appeals *held* that section 1869(b) of the Social Security Act limits judicial review of the Secretary's final decisions as to the proper amount of disputed Medicare benefits to cases where amounts in controversy are $1,000 or more, and that the Secretary's decision in the instant case was final after the Appeals Council's refusal to review, at which time the amount in controversy was $722. *Further held*, the denial of judicial review in such cases does not violate due process or equal protection under the law because Congress excluded judicial review in such cases on a rational basis—i.e., to avoid overburdening the courts.

CUMMINGS, PELL, AND BAUER, Circuit Judges:
Per Curiam

This appeal presents the question whether the district court had jurisdiction over a claim for Medicare benefits where the amount remaining in controversy is less than $1,000.

In April 1974, plaintiff filed her action under the Social Security Act seeking to recover hospital benefits for the period July 7, 1971, through July 17, 1971, in the amount of $722. Plaintiff had been hospitalized from June 11 until July 17 for the treatment of various ailments. The initial decision of the Secretary of Health, Education and Welfare on September 28, 1971, denied plaintiff $1,130.12 in hospital benefits for the period July 1, 1971, to July 17, 1971. On appeal, the Administrative Law Judge allowed six additional days of hospitalization benefits, amounting to $408; his decision became final when the Appeals Council of HEW denied further review on February 28, 1974.[1] The district court granted the Secretary's motion to dismiss for lack of jurisdiction. We affirm.

On October 30, 1972, Congress amended the pertinent provision of the Social Security Act to limit judicial review of the Secretary's "final decision" of the proper amount of disputed Medicare benefits to cases where the amounts in controversy exceed $1,000.[2] Having been enacted prior to the filing of the present lawsuit, this amendment controls. *Cort* v. *Ash*, 422 U.S. 66, 76–77, 95 S.Ct. 2080, 45 L.Ed.2d 26. Indeed Congress specifically provided that the amendment is to govern claims filed in district courts after October 1972. Pub.L. No. 92–603, § 299*O*(b), 86 Stat. 1329. Therefore, whether this statute bars review depends upon a determination of the amount in controversy at the time of the suit. Section 1869(b) of the Social Security Act provides that judicial review can be sought only from a final decision of the Secretary (n. 2 *supra*). By regulation, the Secretary has provided that a decision shall be final after review by the Appeals Council. 20 CFR § 405.730. This occurred on February 28, 1974, and at that time the amount in controversy was about $722. The district court properly granted the Government's motion to dismiss. *Hamilton* v. *Blue Cross of North Dakota*, 375 F. Supp. 1049 (D.N.D.1974); *Wager* v. *Secretary of HEW*, CCH Medicare and Medicaid Guide ¶ 26,780.816 (S.D.N.Y.1973).

Plaintiff contends that the Administrative Law Judge's reduction of her original claim from $1,130.12 to $722 divested her right to judicial review granted by Congress. The contention is without merit because the statutorily granted right to judicial review vested only after final decision by the Secretary. See note 2 *supra;* see also 42 U.S.C. § 405(g).[3]

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[1] The action of the Appeals Council is the final step in the administrative review of the denial of benefits (20 CFR § 404.951) and constitutes the final decision of the Secretary. See 20 CFR § 422.210.

[2] Section 1869(b) of the Social Security Act provides as follows:

"(b) (1) Any individual dissatisfied with any determination under subsection (a) as to—

"(A) whether he meets the conditions of section 226 of this Act or section 103 of the Social Security Amendments of 1965, or

"(B) whether he is eligible to enroll and has enrolled pursuant to the provisions of Part B of this title, or section 1818, or section 1819, or

"(C) the amount of benefits under Part A (including a determination where such amount is determined to be zero) shall be entitled to a hearing thereon by the Secretary to the same extent as is provided in section 205(b) and to judicial review of the Secretary's final decision after such hearing as is provided in section 205(g).

"(2) Notwithstanding the provisions of subparagraph (C) of paragraph (1) of this subsection, a hearing shall not be available to an individual by reason of such subparagraph (C) if the amount in controversy is less than $100; nor shall judicial review be available to an individual by reason of such subparagraph (C) if the amount in controversy is less than $1,000." (42 U.S.C. § 1395ff(b))

This amendment resolved certain difficulties of construction that prevailed under the previous language of Section 1869. See *Cardno v. Finch*, 311 F. Supp. 251 (E.D. La. 1970); *Ridgely v. Secretary of H. E. W.*, 345 F. Supp. 983 (D. Md. 1972), affirmed, 475 F.2d 1222 (4th Cir. 1973); *Bohlen v. Richardson*, 345 F. Supp. 124 (E.D. Pa. 1972), affirmed, 483 F.2d 918 (3d Cir. 1973).

[3] Were plaintiff contending that the Administrative Law Judge and the Appeals Council acted arbitrarily for the purpose of denying plaintiff judicial review, jurisdiction might be found on the basis of Section 10 of the Administrative Procedure Act (5 U.S.C. §§ 701–706; see *Sanders v. Weinberger*, 522 F.2d 1167 (7th Cir. 1975)) or under the Mandamus and Venue Act (28 U.S.C. § 1361). See *Peoples v. United States*

It is well settled that federal district court's possess only the jurisdiction that Congress has conferred upon them. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331, 86 S.Ct. 803, 15 L.Ed.2d 769; *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 551, 82 S.Ct. 1459, 8 L.Ed.2d 671; cf. *Weinberger* v. *Salfi*, —— U.S. ——, 95 S.Ct. 2457, 45 L.Ed.2d 522. Plaintiff, however, contends that in this case the foreclosure of judicial review for claims such as hers violates the due process clause. Congress excluded judicial review of the amount of benefit claims under $1,000 to avoid overburdening the courts (see 118 Cong.Rec. 17,048–17,049 (daily ed., Oct. 5, 1972)); because a rational justification exists for this limitation, it is constitutional. See *United States* v. *Kras*, 409 U.S. 434, 446–447, 93 S.Ct. 631, 34 L.Ed.2d 626; *Dandridge* v. *Williams*, 397 U.S. 471, 484–485, 90 S.Ct. 1153, 25 L.Ed.2d 491.

The brief of *amicus curiae* suggests that the district court had jurisdiction to hear this matter as a mandamus action under 28 U.S.C. § 1361 to require the Administrative Law Judge to state reasons for denying plaintiff's claim. Since this ground was not advanced below, it comes too late for our consideration. In any event, the Administrative Law Judge explained that plaintiff was only entitled to coverage through July 6, 1971, because thereafter she had recovered sufficiently to leave the hospital. Under Section 1862(a)(9) of the Act (42 U.S.C. § 1395y(a)(9)), payments for custodial care are not covered. Plaintiff has not shown a clear right to the relief requested nor a clear duty of the Secretary to pay the benefits sought, so that mandamus would be an inappropriate remedy.

Judgment affirmed.[4]

Eligibility

SECTION 1836 (2)(B) (42 U.S.C. 1395o(2)(B))—SUPPLEMENTARY MEDICAL INSURANCE BENEFITS—ELIGIBILITY—ALIEN RESIDENCY REQUIREMENT

20 CFR 405.205

Mathews v. *Diaz, et al*, 96 S.Ct. 1883 (1976). SSR 76–40c

Under section 1836(2) of the Social Security Act, a person not entitled to hospital insurance benefits under Part A of Title XVIII is eligible to enroll for

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Department of Agriculture, 138 U.S. App.D.C. 291, 427 F.2d 561, 565 (1970); Byse and Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Non-Statutory" Judicial Review of Federal Administrative Actions*, 82 Harv.L.Rev. 308 (1967).

[4] Implicitly plaintiff contends that the limitation of review to claims of more than $1,000 denied plaintiff equal protection of the laws. Because we find that the Congressional classification is supported by a rational basis there is no violation of equal protection. *Dandridge, supra*, 397 U.S. at 485, 90 S.Ct. 1153, 25 L.Ed.2d 491; see also *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16.

Other grounds urged in favor of reversal do not merit discussion.

supplementary medical insurance benefits (SMI) under Part B of Title XVIII, if he is a citizen or, if he is an alien, only if he has been lawfully admitted for permanent residence and has resided in the U.S. continuously during the 5 years immediately preceding the month in which he applies for enrollment. *Held*, Congress has no constitutional duty to provide all aliens with the welfare benefits provided to citizens; *Further Held*, the difference in the SMI eligibility requirements within the class of aliens does not deprive aliens with less than 5 years of U.S. residency of liberty or property in violation of the Due Process clause of the Fifth Amendment.*

STEVENS, Justice:

The question presented by the Secretary's appeal is whether Congress may condition an alien's eligibility for participation in a federal medical insurance program on continuous residence in the United States for a five-year period and admission for permanent residence. The District Court held that the first condition was unconstitutional and that it could not be severed from the second. Since we conclude that both conditions are constitutional, we reverse.

Each of the appellees is a resident alien who was lawfully admitted to the United States less than five years ago. Appellees Diaz and Clara are Cuban refugees who remain in this country at the discretion of the Attorney General; appellee Espinosa has been admitted for permanent residence. All three are over 65 years old and have been denied enrollment in the Medicare Part B supplemental medical insurance program established by § 1831 *et seq.* of the Social Security Act of 1935, 49 Stat. 620, as added, 79 Stat. 301, and as amended, 42 U.S.C. § 1395j *et seq.* (1970 ed. and Supp. IV).[1] They brought this action to challenge the statutory basis for that denial. Specifically, they attack 42 U.S.C. § 1395o(2), which grants eligibility to resident citizens who are 65 or older but denies eligibility to such aliens unless they have been admitted for permanent residence and also have resided in the United States for at least five years.[2] Appellees Diaz and Clara meet neither requirement; appellee Espinosa meets only the first.

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*Any individual age 65 or over is entitled to hospital insurance benefits if he is entitled to monthly benefits under section 202 of the Act or the Railroad Retirement Act (RRA). A disabled individual under age 65 who has been receiving disability benefits under title II or the RRA for 25 consecutive months or who has chronic renal disease and meets certain insured status requirements is also entitled to hospital insurance benefits. Aliens entitled to hospital insurance benefits under any of these provisions need not meet any residency requirements to be eligible to enroll for SMI.

[1] The Medicare Part B medical insurance program for the aged covers a part of the cost of certain physicians' services, home health care, outpatient physical therapy, and other medical and health care. 42 U.S.C. § 1395k (1972 ed. and Supp. IV). The program supplements the Medicare Part A hospital insurance plan, § 1811 *et seq.* of the Social Security Act of 1935, 49 Stat. 620, as added, 79 Stat. 291, and as amended, 42 U.S.C. § 1395c *et seq.* (1970 ed. and Supp. IV), and it is financed in equal parts by the United States and by monthly premiums paid by individuals aged 65 or older who choose to enroll. 42 U.S.C. § 1395r(b) (1972 ed. and Supp. IV).

[2] Title 42 U.S.C. § 1395o (1972 ed., Supp. IV) provides:

"Every individual who—(1) is entitled to hospital insurance benefits under Part A, or (2) has attained age 65 and is a resident of the United States, and is either (A) a citizen or (B) an alien lawfully admitted for permanent residence who has resided in the United States continuously during the 5 years immediately preceding the month in which he applies for enrollment under this part, is eligible to enroll in the insurance program established by this part."

This case does not raise any issues involving subsection (1).

On August 18, 1972, Diaz filed a class action complaint in the United States District Court for the Southern District of Florida alleging that his application for enrollment had been denied on the ground that he was not a citizen and had neither been admitted for permanent residence nor resided in the United States for the immediately preceding five years. He further alleged that numerous other persons had been denied enrollment in the Medicare Part B program for the same reasons. He sought relief on behalf of a class of persons who have been or will be denied enrollment in the Medicare insurance program for failure to meet the requirements of 42 U.S.C. § 1395o(2). Since the complaint prayed for a declaration that § 1395o(2) was unconstitutional and for an injunction requiring the Secretary to approve all applicants who had been denied eligibility solely for failure to comply with its requirements, a three-judge court was constituted.

On September 28, 1972, the District Court granted leave to add Clara and Espinosa as plaintiffs and to file an amended complaint. That pleading alleged that Clara had been denied enrollment for the same reasons as Diaz, but explained that Espinosa, although a permanent resident since 1971, had not attempted to enroll because he could not meet the durational residence requirement, and therefore any attempt would have been futile. The amended complaint sought relief on behalf of a subclass represented by Espinosa—that is, aliens admitted for permanent residence who have been or will be denied enrollment for failure to meet the five-year continuous residence requirement—as well as relief on behalf of the class represented by Diaz and Clara.[3]

On October 24, 1972, the Government moved to dismiss the complaint on the ground, among others, that the District Court lacked jurisdiction over the subject matter because none of the plaintiffs had exhausted his administrative remedies under the Social Security Act. Two days later on October 26, 1972, Espinosa filed his application for enrollment with the

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[3] The District Court certified a class and a subclass, defined, respectively, as follows: "All immigrants residing in the United States who have attained the age of 65 and who have been or will be denied enrollment in the supplemental medical insurance program under Medicare, 42 U.S.C. § 1395j *et seq.* (1970), because they are not aliens lawfully admitted for permanent residence who have resided in the United States continuously during the five years immediately preceding the month in which they apply for enrollment as required by [42 U.S.C. § 1395o(2)(B) (1970 ed., Supp. IV)].

* * * * * * *

"All immigrants lawfully admitted for permanent residence in the United States who have attained the age of 65 and who have been or will be denied enrollment in the supplemental medical insurance program under Medicare, 42 U.S.C. § 1395j et seq. (1970), solely because of their failure to meet the five-year continuous residency requirement of [42 U.S.C. § 1395o(2)(B) (1970 ed., Supp. IV)]." *Diaz* v. *Weinberger*, 361 F. Supp., 1, 7 (SD Fla. 1973) (footnote omitted).

These class certifications are erroneous. The District Court did not possess jurisdiction over the claims of the members of the plaintiff class and subclass who "will be denied" enrollment. Those who "will be denied" enrollment, as the quoted phrase is used in the certification, are those who have yet to be denied enrollment by formal administrative decision. See 361 F. Supp., at 6–7 & n. 7. But the complaint does not allege, and the record does not show, that the Secretary has taken any action with respect to such persons that is tantamount to a denial. It follows that the District Court lacked jurisdiction over their claims, see *post*, at 8–9; *Weinberger* v. *Salfi*, 422 U.S. 749, 764, and that the class and subclass are too broadly defined. In view of our holding that the statute is constitutional, we need not decide whether a narrower class and subclass could have been properly certified.

Secretary. He promptly brought this fact to the attention of the District Court, without formally supplementing the pleadings.

None of the appellees completely exhausted available avenues for administrative review. Nevertheless, the Secretary acknowledged that the applications of Diaz and Clara raised no disputed issues of fact and therefore the interlocutory denials of their applications should be treated as final for the purpose of this litigation. This satisfied the jurisdictional requirements of 42 U.S.C. § 405(g). *Weinberger* v. *Salfi*, 422 U.S. 749, 763–767; *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 641 n. 8. The Secretary did not make an equally unambiguous concession with respect to Espinosa, but in colloquy with the court he acknowledged that Espinosa had filed an application which could not be allowed under the statute.[4] The District Court overruled the Government's motion to dismiss and decided the merits on cross-motions for summary judgment.

The District Court held that the five-year residence requirements violated the Due Process Clause of the Fifth Amendment[5] and that since it could not be severed from the requirement of admission for permanent residence, the alien eligibility provisions of § 1395o(2)(B) were entirely unenforceable. *Diaz* v. *Weinberger*, 361 F. Supp. 1 (S.D. Fla. 1973). The District Court reasoned that "even though fourteenth amendment notions of equal protection are not entirely congruent with fifth amendment concepts of due process," *id.*, at 9, the danger of unjustifiable discrimination against aliens in the enactment of welfare programs is so great, in view of their complete lack of representation in the political process, that this federal statute should be tested under the same pledge of equal protection as a state statute. So tested, the court concluded that the statute was invalid because it was not both rationally based and free from invidious discrimination. It rejected the desire to preserve the fiscal integrity of the program, or to treat some aliens as less deserving than others, as adequate justification for the statute. Accordingly, the court enjoined the Secretary from refusing to enroll members of the class and subclass represented by appellees.

The Secretary appealed directly to this Court.[6] We noted probable jurisdiction. 416 U.S. 980. After hearing argument last Term, we set the case for reargument. 420 U.S. 959. We now consider (1) whether the District Court had jurisdiction over Espinosa's claim; (2) whether Congress may discriminate in favor of citizens and against aliens in providing welfare benefits; and (3) if so, whether the specific discriminatory provisions in § 1395o(2)(B) are constitutional.

I

Espinosa's claim squarely raises the question whether the requirement of five years continuous residence is constitutional, a question that is not necessarily presented by the claims of Diaz and Clara. For if the requirement of admission for permanent residence is valid, their applications were properly denied even if the durational residence requirement is defective.[7] We must therefore decide whether the District Court had jurisdiction over Espinosa's claim.

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[4] See *post*, at 8–9 and n. 11.

[5] "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const., Amend. V.

[6] The Secretary asserted jurisdiction in this Court by direct appeal under 28 U.S.C. §§ 1252, 1253. Since we possess jurisdiction under § 1252, which provides for direct appeal to this Court from a judgment of a federal court holding a federal statute unconstitutional in a civil action to which a federal officer is a party, we need not decide whether an appeal lies under § 1253. *Weinberger* v. *Salfi*, 422 U.S. 749, 763 n. 8.

We have little difficulty with Espinosa's failure to file an application with the Secretary until after he was joined in the action. Although 42 U.S.C. § 405(g) establishes filing of an application as a nonwaivable condition of jurisdiction, *Mathews* v. *Eldridge*, No. 74–204, Slip op., at 6–7 (Feb. 24, 1976); *Weinberger* v. *Salfi*, 422 U.S. 749, 764, Espinosa satisfied this condition while the case was pending in the District Court. A supplemental complaint in the District Court would have eliminated this jurisdictional issue,[8] since the record discloses, both by affidavit and stipulation, that the jurisdictional condition was satisfied, it is not too late, even now, to supplement the complaint to allege this fact.[9] Under these circumstances, we treat the leadings as properly supplemented by the Secretary's stipulation that Espinosa had filed an application.

A further problem is presented by the absence of any formal administrative action by the Secretary denying Espinosa's application. Section 405(g) requires a final decision by the Secretary after a hearing as a prerequisite of jurisdiction. *Mathews* v. *Eldridge, supra,* Slip op., at 6–8; *Weinberger* v. *Salfi, supra,* at 763–765. However, we held in *Salfi* that the Secretary could waive the exhaustion requirements which this provision contemplates and that he had done so in that case. *Id.*, at 765–767; accord, *Mathews* v. *Eldridge, supra,* Slip op., at 6–8 (dictum); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 641 n. 8. We reach a similar conclusion here.

The plaintiffs in *Salfi* alleged that their claims had been denied by the local and regional Social Security offices and that the only question was one of constitutional law, beyond the competence of the Secretary to decide. These allegations did not satisfy the exhaustion requirements of § 405(g) or the Secretary's regulations, but the Secretary failed to challenge the sufficiency of the allegations on this ground. We interpreted this failure as a determination by the Secretary that exhaustion would have been futile and deferred to his judgment that the only issue presented was the constitutionality of a provision of the Social Security Act.

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[7] Diaz and Clara contend that requirement of lawful admission for permanent residence should be construed so that it is satisfied by aliens, such as themselves, who have been paroled into the United States at the discretion of the Attorney General. However, such aliens remain in the United States at the discretion of the Attorney General, 8 U.S.C. § 1182(d)(5), and hence cannot have been "lawfully admitted for permanent residence," as § 1395o(2)(B) requires.

[8] Fed Rule Civ. Proc. 15(d); *Security Ins. Co. of New Haven* v. *United States ex rel. Haydis*, 338 F.2d 444, 447–449 (CA9 1964).

[9] "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. § 1653. Although the defect in Espinosa's allegations must be cured by supplemental pleading, instead of amended pleading, the statutory purpose of avoiding needless sacrifice to defective pleading applies equally to this case. See *Schlesinger* v. *Councilman*, 420 U.S. 738, 744 n. 9; *Willingham* v. *Morgan*, 395 U.S. 402, 407–408 and n. 3. Despite Espinosa's failure to supplement the complaint, the District Court was aware that he had filed his application; since the Secretary stipulated that the application had been filed, the defect in the pleadings surely did not prejudice him.

The same reasoning applies to the present case. Although the Secretary moved to dismiss for failure to exhaust administrative remedies, at the hearing on the motion he stipulated that no facts were in dispute, that the case was ripe for disposition by summary judgment, and that the only issue before the District Court was the constitutionality of the statute.[10] As in *Salfi*, this constitutional question is beyond the Secretary's competence. Indeed, the Secretary has twice stated in this Court that he stipulated in the District Court that Espinosa's application would be denied for failure to meet the durational residence requirement.[11] For jurisdictional purposes, we treat the stipulation in the District Court as tantamount to a decision denying the application and as a waiver of the exhaustion requirements. Cf. *Weinberger* v. *Wiesenfeld, supra,* at 640 n. 6, 641 n. 8.

We conclude, as we did in *Salfi*, that the Secretary's submission of the question for decision on the merits by the District Court satisfied the statutory requirement of a hearing and final decision. We hold that Espinosa's claim, as well as the claims of Diaz and Clara, must be decided.

II

There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty or property without due process of law. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 48–51; *Wong Wing* v. *United States*, 163 U.S. 228, 238; see *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 489. Even one whose presence in this country is unlawful, involuntary, or transitory, is entitled to that constitutional protection. *Wong Yang Sung, supra; Wong Wing, supra.*

The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogenous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other;[12]

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[10] Record on Appeal, at 224–227. See Memorandum of Law in Support of Defendant's Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, Record on Appeal, at 259–260.

[11] Jurisdictional Statement, at 3 n. 3; Brief for the Appellant, at 5 n. 5. In his Supplemental Brief, filed after our decision in *Salfi*, the Secretary argues that the District Court did not possess jurisdiction over Espinosa's claim because it was not until after the District Court had issued its injunction that the Secretary resolved an unspecified factual issue presented by Espinosa's application, and that such a belated confirmation that Espinosa's application should be denied could not confer jurisdiction upon the District Court *nunc pro tunc*. Supplemental Brief for the Appellant, at 4 and n. 1. However, the District Court's jurisdiction was not founded upon the Secretary's subsequent confirmation that Espinosa's application should be denied, but rather upon the Secretary's stipulation in the District Court that no factual issues remained, that the case was ripe for disposition by summary judgment, and that the only issue was the constitutionality of the statute. Even though *Salfi* had not been decided when he so stipulated, he is not now free to withdraw his stipulation, and no reason appears why he should be permitted to do so.

[12] The Constitution protects the privileges and immunities only of citizens, Amend. XIV, § 1; see Art. IV, § 2, cl. 1, and the right to vote only of citizens. Amends. XV,

and the class of aliens is itself a heterogenous multitude of persons with a wide-ranging variety of ties to this country.[13]

In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens[14] and the reservation of the power to

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XIX, XXIV, XXVI. It requires that Representatives have been citizens for seven years, Art. I, § 2, cl. 2, and Senators citizens for nine, Art. I, § 3, cl. 3, and that the President be a "natural born Citizen." Art. II, § 1, cl. 5.

A multitude of federal statutes distinguish between citizens and aliens. The whole of Title 8 of the United States Code, regulating aliens and nationality, is founded on the legitimacy of distinguishing citizens and aliens. A variety of other federal statutes provide for disparate treatment of aliens and citizens. These include prohibitions and restrictions upon government employment of aliens, *e. g.*, 10 U.S.C. § 5571; 22 U.S.C. § 1044 (e), upon private employment of aliens, *e. g.*, 10 U.S.C. § 2279; 12 U.S.C. § 72, and upon investments and businesses of aliens, *e. g.*, 12 U.S.C. § 619; 47 U.S.C. § 17; statutes excluding aliens from benefits available to citizens; *e. g.*, 26 U.S.C. § 931 (1970 ed. and Supp. IV); 46 U.S.C. § 1171(a), and from protections extended to citizens, *e. g.*, 19 U.S.C. § 1526; 29 U.S.C. § 633a (1970 ed., Supp. IV); and statutes imposing added burdens upon aliens, *e. g.*, 26 U.S.C. § 6851(d); 28 U.S.C. § 1391(d). Several statutes treat certain aliens more favorably than citizens. *E. g.*, 19 U.S.C. § 1586(e); 50 U.S.C. App. § 453 (1970 ed., Supp. IV). Other statutes, similar to the one at issue in this case, provide for equal treatment of citizens and aliens lawfully admitted for permanent residence. 10 U.S.C. § 8253; 18 U.S.C. § 613(2) (1970 ed., Supp. IV). Still others equate citizens and aliens who have declared their intention to become citizens. *E. g.*, 43 U.S.C. § 161; 30 U.S.C. § 22. Yet others condition equal treatment of an alien upon reciprocal treatment of United States citizens by the alien's own country. *E. g.*, 10 U.S.C. § 7435(a); 28 U.S.C. § 2502.

[13] The classifications among aliens established by the Immigration and Nationality Act, 66 Stat. 163, as amended, 8 U.S.C. § 1101 *et seq.* (1970 ed. and Supp. IV), illustrate the diversity of aliens and their ties to this country. Aliens may be immigrants or nonimmigrants. 8 U.S.C. § 1101(a)(15). Immigrants, in turn, are divided into those who are subject to numerical limitations upon admissions and those who are not. The former are subdivided into preference classifications which include: grown unmarried children of citizens; spouses and grown unmarried children of aliens lawfully admitted for permanent residence; professionals and those with exceptional ability in the sciences or arts; grown married children of citizens; brothers and sisters of citizens; persons who perform specified permanent skilled or unskilled labor for which a labor shortage exists; and certain victims of persecution and catastrophic natural calamities who were granted conditional entry and remained in the United States at least two years. 8 U.S.C. § 1153(a)(1)–(7). Immigrants not subject to numerical limitations include: children and spouses of citizens and parents of citizens at least 21 years old; natives of independent countries of the Western Hemisphere; aliens lawfully admitted for permanent residence returning from temporary visits abroad; certain former citizens who may reapply for acquisition of citizenship; certain ministers of religion; and certain employees or former employees of the United States Government abroad. 8 U.S.C. §§ 1101(a)(27), 1151(a), (b). Nonimmigrants include: officials and employees of foreign governments and certain international organizations; aliens visiting temporarily for business or pleasure; aliens in transit through this country; alien crewmen serving on a vessel or aircraft; aliens entering pursuant to a treaty of commerce and navigation to carry on trade or an enterprise in which they have invested; aliens entering to study in this country; certain aliens coming temporarily to perform services or labor or to serve as trainees; alien representatives of the foreign press or other information media; certain aliens coming temporarily to participate in a program in their field of study or specialization; aliens engaged to be married to citizens; and certain alien employees entering temporarily to continue to render services to the same employers. 8 U.S.C. § 1101(a)(15). In addition to lawfully admitted aliens, there are, of course, aliens who have entered illegally.

[14] *Kleindienst* v. *Mandel*, 408 U.S. 753, 765–770.

deport[15] have no permissible counterpart in the Federal Government's power to regulate the conduct of its own citizenry.[16] The fact that an act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is "invidious."

In particular, the fact that Congress has provided some welfare benefits for citizens does not require it to provide life benefits for *all aliens.* Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its own citizens and *some* of its guests. The decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence.

The real question presented by this case is not whether discrimination between citizens and aliens is permissible; rather, it is whether the statutory discrimination *within* the class of aliens—allowing benefits to some aliens but not to others—is permissible. We turn to that question.

III

For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government.[17] Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the legislature or the executive than to the judiciary. This very case illustrates the need for flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication. Appellees Diaz and Clara are but two of over 440,000 Cuban refugees who arrived in the United States between 1961 and 1972.[18] And the Cuban parolees are but one of several categories of aliens who have been admitted in order to make a humane response to a natural catastrophe or an international political situation.[19] Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution.[20] The reasons that preclude judicial review of political questions[21] also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.

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[15] *Galvan* v. *Press,* 347 U.S. 522, 530–532; *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 584–591.

[16] See *Zemel* v. *Rusk,* 381 U.S. 1, 13–16, *Aptheker* v. *Secretary of State,* 378 U.S. 500, 505–514; *Kent* v. *Dulles,* 357 U.S. 116, 125–130.

[17] "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 588–589 (footnote omitted). Accord, *e. g., Kleindienst* v. *Mandel,* 408 U.S. 753, 765–767; *Fong Yue Ting* v. *United States,* 149 U.S. 698, 711–713.

[18] Cuban Refugee Program, Weekly Statistical Report for November 13–17, 1972, Joint Appendix, at 40.

[19] See 8 U.S.C. §§ 1153(a)(7), 1182(d)(5).

Since it is obvious that Congress has no constitutional duty to provide *all aliens* with the welfare benefits provided to citizens, the party challenging the constitutionality of the particular line Congress has drawn has the burden of advancing principal reasoning that will at once invalidate that line and yet tolerate a different line separating some aliens from others. In this case the appellees have challenged two requirements, first that the alien be admitted as a permanent resident, and second that his residence be of a duration of at least five years. But if these requirements were eliminated, surely Congress would at least require that the alien's entry be lawful; even then, unless mere transients are to be held constitutionally entitled to benefits, *some* durational requirement would certainly be appropriate. In short, it is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence. Since neither requirement is wholly irrational, this case essentially involves nothing more than a claim that it would have been more reasonable for Congress to select somewhat different requirements of the same kind.

We may assume that the five-year line drawn by Congress is longer than necessary to protect the fiscal integrity of the program.[22] We may also assume that unnecessary hardship is incurred by persons just short of qualifying. But it remains true that some line is essential, that any line must produce some harsh and apparently arbitrary consequences, and, of greatest importance, that those who qualify under the test Congress has chosen may reasonably be presumed to have a greater affinity to the United States than those who do not. In short, citizens and those who are most like citizens qualify. Those who are less like citizens do not.

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[20] An unlikely, but nevertheless possible consequence of holding that appellees are constitutionally entitled to welfare benefits would be a further extension of similar benefits to over 440,000 Cuban parolees.

[21] "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker* v. *Carr*, 369 U.S. 186, 217.

[22] The District Court held that the durational residence requirement was not rationally related to maintaining the fiscal integrity of the Medicare Part B program because the program is financed on a "current cost" basis, half by appropriations from the general revenues and half by premiums from enrolled individuals; because aliens who do not meet the residence requirement would constitute no greater burden on the general revenues than enrolled citizens who have not paid federal taxes or who pay their premiums from federally subsidized welfare benefits; because aliens, like citizens, must pay federal taxes; and because the residency requirement only postopones treatment of aliens until costlier medical care is necessary 361 F. Supp., at 10–12.

The task of classifying persons for medical benefits, like the task of drawing lines for federal tax purposes, inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line; the differences between the eligible and the ineligible are differences in degree rather than differences in the character of their respective claims. When this kind of policy choice must be made, we are especially reluctant to question the exercise of congressional judgment.[23] In this case, since appellees have not identified a principled basis for prescribing a different standard than the one selected by Congress, they have, in effect, merely invited us to substitute our judgment for that of Congress in deciding which aliens shall be eligible to participate in the supplementary insurance program on the same conditions as citizens. We decline the invitation.

IV

The cases on which appellees rely are consistent with our conclusion that this statutory classification does not deprive them of liberty or property without due process of law.

Graham v. *Richardson*, 403 U.S. 365, provides the strongest support for appellees' position. That case holds that state statutes that deny welfare benefits to resident aliens, or to aliens not meeting a requirement of durational residence within the United States, violate the Equal Protection Clause of the Fourteenth Amendment and encroach upon the exclusive federal power over the entrance and residence of aliens. Of course, the latter ground of decision actually supports our holding today that it is the business of the political branches of the Federal Government, rather than that of either the States or the federal judiciary, to regulate the conditions of entry and residence of aliens. The equal protection analysis also involves significantly different considerations because it concerns the relationship between aliens and the States rather than between aliens and the Federal Government.

Insofar as state welfare policy is concerned,[24] there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State's interests in administering its welfare programs are concerned. Thus, a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business. Furthermore, whereas the Constitution inhibits every State's power to restrict travel across its own borders, Congress is explicitly empowered to exercise that type of control over travel across the borders of the United

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[23] *Weinberger* v. *Salfi*, 422 U.S. 749, 768–774; *Dandridge* v. *Williams*, 397 U.S. 471, 483–487.

[24] We have left open the question whether a State may prohibit aliens from holding elective or important nonelective positions or whether a State may, in some circumstances, consider the alien status of an applicant or employee in making an individualized employment decision. See *Sugarman* v. *Dougall*, 413 U.S. 634, 646–649. *In re Griffith*, 413 U.S. 717, 728–729 and n. 21.

States.[25]

The distinction between the constitutional limits on state power and the constitutional grant of power to the Federal Government also explains why appellees' reliance on *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, is misplaced. That case involved Arizona's requirement of durational residence within a county in order to receive nonemergency medical care at the county's expense. No question of alienage was involved. Since the sole basis for the classification between residents impinged on the constitutionally guaranteed right to travel within the United States, the holding in *Shapiro* v. *Thompson*, 394 U.S. 618, required that it be justified by a compelling state interest.[26] Finding no such justification, we held that the requirement violated the Equal Protection Clause. This case, however, involves no state impairment of the right to travel—nor indeed any impairment whatever of the right to travel within the United States; the predicate for the equal protection analysis in those cases is simply not present. Contrary to appellees' characterization, it is not "political hypocrisy" to recognize that the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization.

Finally, we reject the suggestion that *United States Dept. of Agriculture* v. *Moreno*, 413 U.S. 528, lends relevant support to appellees' claim. No question involving alienage was presented in that case. Rather, we found that the denial of food stamps to households containing unrelated members was not only unsupported by any rational basis but actually was intended to discriminate against certain politically unpopular groups. This case involves no impairment of the freedom of association of either citizens or aliens.

We hold that § 1395o(2)(B) has not deprived appellees of liberty or property without due process of law.

The judgment of the District Court is *Reversed.*

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[25] "State alien residency requirements that either deny welfare benefits to noncitizens or condition them on longtime residency, equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible." *Graham* v. *Richardson*, *supra*, at 380.

[26] In *Shapiro* v. *Thompson*, we held that state-imposed requirements of durational residence within the State for receipt of welfare benefits denied equal protection because such requirements unconstitutionally burdened the right to travel interstate. Since the requirements applied to aliens and citizens alike, we did not decide whether the right to travel interstate was conferred only upon citizens. However, our holding was predicated expressly on the requirement "that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Id.*, at 629. See *Graham* v. *Richardson*, *supra*, at 375–376, 377–380.

Appellees also gain no support from *Washington* v. *Legrant*, 394 U.S. 618, a case decided with *Shapiro* v. *Thompson*. *Legrant* involved a congressionally imposed requirement of one year's residence within the District of Columbia for receipt of welfare benefits. As in *Shapiro* v. *Thompson*, no question of alienage was involved. We held that the requirement violated the Due Process Clause of the Fifth Amendment for the same reasons that the state-imposed durational residence requirements violated the Equal Protection Clause of the Fourteenth Amendment. *Id.*, at 641–642. Unlike the situation in *Shapiro* and *Legrant*, the durational residence requirement in this case could at most deter only the travel of aliens into the United States. The power of Congress to prevent the travel of aliens into this country cannot seriously be questioned.

SUPPLEMENTAL SECURITY INCOME

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Marital Relationship

SECTION 1614(d)(2) and 1614(f)(1) (42 U.S.C. 1382c(d)(2) and 1382c(f)(1))—SUPPLEMENTAL SECURITY INCOME—MARITAL RELATIONSHIP

20 CFR 416.1003(b) and (c) and 416.1005(a) SSR 76-27

> The claimant and a woman whom he holds out to the community to be his wife, reside in a State which does not recognize common-law marriages. The Social Security Administration determined that a husband-wife relationship existed according to section 1614(d)(2) of the Social Security Act. The claimant contended that since the State of his residence does not recognize a marriage relationship, the Federal Government should be precluded from recognizing one. *Held*, a husband-wife relationship as defined in section 1614(d)(2) of the Social Security Act, as amended, does exist whether or not such relationship is recognized by the State in which they reside. Because of this relationship, the claimant is subject to the income and resource deeming provisions of section 1614(f)(1) of the Social Security Act.

The general issue is whether the claimant is a "husband" under section 1614(d)(2) of the Social Security Act, as amended, and if so, is the claimant affected by the deeming provisions of section 1614(f)(1) of the Social Security Act, as amended. The specific issues to be decided are: Whether the claimant and a woman who are holding themselves out as man and wife to the community in which they reside, are husband and wife under the Social Security Act; and what effect would a State's nonrecognition of a common-law marriage have in the final determination as to whether they are husband and wife?

The claimant, an obviously disabled individual, appeared at the hearing with a woman whom he identified as his wife, Eve. Claimant admitted at the hearing that he considered Eve to be his wife and that they had lived together holding themselves out to the community as man and wife since 1971. He indicated that there had never been a formal marriage ceremony binding them but that they looked upon one another as husband and wife. Eve also indicated in her testimony at the hearing that the claimant's testimony was substantially correct. Both indicated that the child now living with them was the natural son of the claimant and Eve.

Section 1614(d)(2) of the Social Security Act provides that:

> "In determining whether two individuals are husband and wife for purposes of this title, appropriate State Law shall be applied; except that . . . if a man and woman are found to be holding themselves out to the community in which they reside as husband and wife, they shall be so considered for purposes of this title notwithstanding any other provision of this section."

Section 416.1005(a) of Regulations No. 16 reads in part as follows:

> "Two individuals may be considered to be husband and wife for the purpose of determining that one is the spouse of the other under title XVI of the Act if at the time the application for payments is made or at any later date:
> (1) The individuals are living together in the same household, and holding themselves out to the community in which they reside as husband and wife . . ."

Section 416.1003(b) and (c) of Regulations No. 16 in this regard reads as follows:

> "For purposes of this subpart, the term 'household' means one or more individuals living as a family unit in a single place of abode . . . A man and woman are 'holding themselves out as husband and wife' if they represent themselves as husband and wife (or as married to each other) to relatives, friends, neighbors, or tradespeople with whom they do business."

Claimant does not contest the factual situation in the case but disagrees with the legal application of the Law and Regulations dealing with the legal definition of husband and wife and the application of deeming provisions. Claimant's main contention is that since the State of Kentucky does not recognize common-law marriages that this would preclude the Federal Government, specifically the Social Security Administration, from recognizing their common-law marriage, and thus finding that claimant and Eve were husband and wife and further finding that the deeming provisions of the Social Security Act would apply.

Since claimant and Eve have conceded that they have held themselves out as husband and wife in the community, and have considered themselves to be husband and wife since 1971, the question for decision is, what effect does the State of Kentucky's refusal to recognize common-law marriage have on the Federal Government's recognition of the claimant and Eve as husband and wife? The answer is found in the above cited Section 1614(d)(2) of the Social Security Act.

This section of the Act is intended to inform us that whether or not a State recognizes a common-law marriage is not the criteria by which the Federal Government will ultimately decide whether or not a man and woman are truly husband and wife. This section indicates that if a State were to find a common-law relationship between a man and woman and were to recognize such relationship as a valid marriage, the Federal Government would accept this in determining that they were man and wife. In the reverse situation where no valid marriage is recognized by a State, the Federal Government, more specifically the Social Security Administration, is directed to look at the specific relationship between the man and woman themselves, i.e., do they treat one another as man and wife, do they indicate to others in the surrounding area in which they live that they are man and wife?

Once it is determined that claimant and Eve are husband and wife, whether common-law or otherwise, or whether or not recognized by the State in which they reside, the application of the deeming provisions of the Social Security Act must follow. Subject to certain exclusions in the Social Security Act, the income and resources of Eve will be deemed to the claimant.

In view of the above premises, the Hearing Examiner concludes that the claimant and Eve are husband and wife and have been husband and wife, according to their own testimony, since 1971 and, will continue to be husband and wife. Furthermore, since they are husband and wife, as defined by Section 1614(d)(2), Social Security Act, as amended, they automatically are subject to the income and resources deeming provisions of Section 1614(f)(1) of the Social Security act, as amended, which provides:

> "For purposes of determining eligibility for and the amount of benefits for any individual who is married and whose spouse is living with him in the same household but is not an eligible spouse, such individual's income and resources shall be deemed to include any income and resources of such spouse, whether or not available to such individual, except to the extent determined by the Secretary to be inequitable under the circumstances."

It is the decision of the Hearing Examiner that the claimant and Eve are husband and wife as defined by Section 1614(d)(2) of the Social Security Act, as amended, and as such they are subject to the income and resources deeming provisions of Section 1614(f)(1) of the Social Security act, as amended.

Definition of Eligible Spouse

SECTION 1614(b) (42 U.S.C. 1382c(b))—SUPPLEMENTAL SECURITY INCOME—DEFINITION OF ELIGIBLE SPOUSE

20 CFR 416.1040 and 416.1321(a) SSR 76-41

The claimant for supplemental security income payments and her spouse separated in September 1974; both continued to live alone. The couple obtained a divorce in March 1975. Payments to the spouse were suspended by the Social Security Administration in December 1974 after his checks were returned by the postal service as undeliverable. The claimant contends she should have received a payment as an eligible individual at the time the spouse's payments ceased. *Held*, through March 1975, the claimant and her spouse continue to meet the definition of an eligible couple as set forth in section 416.1040 of Regulations No. 16.

The claimant and her husband were married on January 24, 1971. Prior to September 30, 1974, both were eligible for supplemental security income benefits and were receiving said benefits as an eligible couple. A determination was made that, effective October 1974, the benefits would be reduced in consideration of income which her husband was receiving as an employee.

The claimant objected to such reduction stating that she and her husband separated on September 30, 1974. Her husband left her after they received the notices that their checks would be reduced. The claimant's husband allegedly stated he would not support her.

Regulations No. 16, section 416.1040 provides, in general, that where an eligible individual and an eligible spouse are receiving payments under title XVI of the Social Security Act, the eligible spouse will no longer qualify as a spouse, effective with the month following the month in which the marriage is terminated or deemed terminated. The eligible spouse, if otherwise qualified, may receive benefits as an eligible individual beginning with the month following such month of termination. A marriage may be terminated by death, divorce, or annulment. Where a court of competent jurisdiction issues a decree of divorce, both parties shall be deemed not married to each other beginning with the month following the month in which the decree becomes final. Section 416.1040(c) provides, in effect, that in the case of separation of parties, where neither party begins living with another individual, that such eligible individual and eligible spouse shall not be considered husband and wife effective with the month in which they have been separated for six months. The six month period of separation shall be counted from the date of separation. Where, however, one of the parties begins living with another individual, the eligible individual and eligible spouse shall not be considered husband and wife effective with the month in which the eligible individual or the eligible spouse commenced living in the same household with such other person.

The claimant had not been living with her husband or any other individual since September 30, 1974, and for a period of at least six months, and stated that to the best of her knowledge, her husband had not been living with another individual for a similar period of time.

The marriage was terminated by divorce effective March 25, 1975. Therefore, the parties would have been deemed not to be married to each other beginning with the month following the month in which the decree became final, in this case, April 1975.

In addition, on March 30, 1975, the claimant and her spouse were separated for a period of six months, neither party having begun living with another individual in the interim. Thus, the claimant and her spouse should not have been considered to be husband and wife for the purposes of title XVI of the Social Security Act effective March 30, 1975, and the claimant, being presumably otherwise qualified, should have received payments as an eligible individual effective the following month, April 1975.

It is, however, the contention of the claimant and there is an abundance of evidence, both in the form of testimony and documentary evidence to the effect that the claimant did not receive support from her former husband prior to September 30, 1974, nor after that date. There is, however, no provision under title XVI of the Social Security Act for consideration of whether support is being given between members of an eligible couple, that is, an eligible individual and an eligible spouse, or how benefits which are received are divided and apportioned between them, or how such benefits are to be used. The law provides that an eligible individual with an eligible spouse receives benefits at a different rate than that of an eligible individual alone. Whether a member of an eligible couple is or is not receiving support from her spouse is, therefore, not determinative of the issues to be decided in this case.

The claimant further contended that her former husband's benefits were terminated effective December 1, 1974, and that following the separation on September 30, 1974, the husband maintained a separate residence where he received his SSI checks. She further stated that payments continued until December 1, 1974, then his benefits were terminated as his October check was returned to Social Security because he no longer resided at the address he had previously given and no additional or forwarding address was provided.

The claimant contends her husband did not receive payments after September 1, 1974, and for all practical purposes was terminated on or about October 1, 1974. Since the theory of a reduced check to the claimant is based on payments to her spouse, no reduction was in order after October 1, 1974, as her spouse at that time was receiving no payments.

Subpart M of Social Security Regulations No. 16 provides for suspensions and terminations of supplemental security income benefits. Section 416.1321(a) of said Subpart M provides as follows:

> "When suspension is proper. Suspension of benefit payments is required when a recipient is alive but no longer meets the requirements of eligibility under title XVI of the Act (see Subpart B of this part) and termination in accordance with section 416.1331–416.1335 does not apply. (This subpart does not cover suspension of payments for administrative reasons, as, for example, when mail is returned as undeliverable by the postal service and the Administration does not have a valid mailing address for a recipient or when the representative payee dies and a search is underway for a substitute representative payee.)"

The husband's benefits were not suspended or terminated within the meaning of the above cited section of Regulations No. 16, but the payments were suspended for administrative reasons, as when mail is returned as undeliverable by the postal service and the Social Security Administration does not have a valid mailing address for a recipient. In the absence of evidence to the contrary, it appears the husband continued to be eligible for benefits and was a member of an "eligible couple" from the time of separation through the month of March. The claimant, therefore, was also a member of an eligible couple (or more accurately) an eligible individual with an eligible spouse.

Therefore, it is held that the claimant's supplemental security income benefits should have been reduced effective October 1974 because of her eligible spouse's income, but that claimant being otherwise qualified, should receive payments as an eligible individual effective April 1975.

Eligibility—Marital Relationship

SECTION 1614(d)(2) (42 U.S.C. 1382c(d)(2))—SUPPLEMENTAL SECURITY INCOME—ELIGIBILITY—MARITAL RELATIONSHIP

SSR 76-42

20 CFR 416.1003(c), 416.1005(a)(1), 416.1007, 416.1035, and 416.1185(a)

The claimant lives in the same household with a person of the opposite sex and they are known throughout the community in which they live as man and wife. The claimant contends she is not in a husband-wife relationship with the person with whom she has been living because she is still legally married to another man. *Held*, the claimant is determined to be in a marital relationship for Supplemental Security Income purposes as defined by Section 1614(d)(2) of the Social Security Act, as amended.

The claimant stated that she has lived with W since 1945 following a separation from her lawful husband. "I began living with W and have lived with him since then (1945)—although we have never been married. W and I have four children; two of them still live at home with us. He lists me as his wife on his tax returns, we have a joint checking account and our car is in both our names."

A copy of W's wage and tax statement discloses that he earned $15,501.95 in 1974. In addition, a receipt of rent discloses that the lessor of the claimant's premises referred to the claimant and W as Mr. and Mrs. W.

On July 10, 1975, the claimant responded to a series of five questions propounded by the Social Security Administration in order to determine the claimant's living arrangements and marital status. In this document the claimant stated that ". . . sometimes we call ourselves Mr. and Mrs. but mostly we introduce ourselves by first names." When asked how the mail is addressed to the claimant and W, the claimant responded ". . . sometimes it's addressed to Mr. and Mrs. W."

20 C.F.R. 416.1003(c) states that a man and a woman are 'holding themselves out as husband and wife' if they represent themselves as husband and wife (or as married to each other) to relatives, friends, neighbors or tradespeople with whom they do business.

20 C.F.R. 416.1005(a)(1) defines a marital relationship for supplemental security income purposes to include individuals that are living together in the same household, and holding themselves out to the community in which they reside as husband and wife.

20 C.F.R. 416.1007 states that if a man and woman are living together in the same household, and holding themselves out to the community in which they reside as husband and wife, they shall be considered husband and wife for the purposes of Title XVI of the Act. Where a man and woman living together in the same household allege as in this case that they are not husband and wife and that they are not holding themselves out as such to the community in which they reside, then they must establish such in accordance with 20 C.F.R. 416.1035(b).

The evidence is clear that under title XVI of the Social Security Act as amended a marital relationship between claimant and W has been established. The information supplied pursuant to the requirements of 20 C.F.R. 416.1035(b) discloses the claimant lives in the same household with the ineligible individual and they hold themselves out to the community in which they reside as husband and wife. The mail is often addressed to Mr. and Mrs. W and he includes the claimant as a dependent wife on his tax returns. In addition, the parties hold themselves out to the community as husband and wife when being introduced to other people.

As a result of the claimant's relationship with W, W's income is deemed to be income to the claimant as required by Regulations No. 16, section

416.1185(a). It is therefore held that the claimant is not entitled to Supplemental Security Income benefits because of excess income.

Amount of Benefits

SECTIONS 1611(b)(2), 1612(a), and 1614(b) (42 U.S.C. 1382(b)(2), 1382a(a), and 1382c(b))—SUPPLEMENTAL SECURITY INCOME—AMOUNT OF BENEFITS—RELATIONSHIP

20 CFR 416.412, 416.432, 416.1001, and 416.1101 SSR 76-28

The claimant and her husband were receiving Supplemental Security Income (SSI) as an eligible couple. Their only other source of income was his social security benefits. After they separated, they continued to receive SSI benefits at the rate applicable to eligible couples. The amount each received was computed by reducing the payment provided eligible couples because of the husband's social security benefit and dividing this reduced payment in two. One half was sent to claimant and one half to her eligible spouse. The claimant contended her benefit should be that applicable to eligible individuals and that the social security benefits paid to her estranged husband should not reduce her SSI grant. *Held*, the status of the claimant and her spouse as an eligible couple continues until they have been separated for 6 months and the social security benefits are income to the eligible couple which reduces the amount received by each.

The general issue to be determined is the amount of Supplemental Security Income benefits payable to claimant. The specific issues are: (1) will the claimant and her husband be treated as a couple during the first 6 months of their separation; (2) will social security benefits of an eligible spouse, who is the husband of claimant, be considered as unearned income in computing the benefits payable to an eligible couple; and (3) should the Supplemental Security Income benefits payable to an eligible couple be divided equally between the claimant and her eligible spouse?

Claimant and her husband were converted from the State welfare rolls on January 1, 1974. At that time, they were an eligible couple. Claimant's husband received a title II social security benefit of $94.80 a month. In September 1974, claimant and her husband separated. The Social Security Administration has included in the computation of claimant's grant a part of this income of her eligible spouse.

Section 416.412 of Regulations No. 16 provides, in effect, that benefits under this part for an eligible couple shall be payable at the rate of $210 per month for the period ending June 30, 1974, and at the rate of $219 per month for the remainder of 1974 and any calendar year thereafter, reduced by the amount of income not excluded pursuant to Subpart K of Regulations No. 16, of such individual and spouse.

Section 416.1101 of Regulations No. 16, provides, in effect, that under title XVI of the Social Security Act, as amended, an individual's income includes all of his own income in cash or in kind, both earned or unearned, and includes all the income of his or her eligible spouse.

The social security benefit paid to the husband, after applying the appropriate exclusion, is used to determine the amount of SSI benefits paid to claimant and her eligible spouse. The social security payment of $94.80 is reduced by the $20 exclusion, §416.1165, leaving countable income in the amount of $74.80 per month. The monthly SSI benefit for a couple is $219, and this amount is reduced by the countable income of $74.80. There remains a balance of a combined benefit amount totaling $144.20. One-half of this amount is $72.10, and is payable each month to claimant, §416.501.

Section 416.1001 of Regulations No. 16 provides, in effect, that if a husband and a wife are both aged, blind, or disabled individuals living in the same household, or if such husband and wife have been separated for less than 6 months, and such husband and wife are eligible for payments under title XVI of the Act, such payments shall be made to them as a couple. The payment made for an eligible couple will be less than the sum of the separate amounts which they could receive if each was an eligible individual. The eligibility of an individual or a couple for a payment for a month will be based on their marital status on the first day of the month. Any subsequent change in marital status within a month will not affect the eligibility for, or the amount of, the payment for such month.

Section 416.432 of Regulations No. 16, subsection (d), provides, in effect, that when there is a dissolution of an eligible couple and each member of the couple becomes an eligible individual for one (1) or two (2) months of the quarter, a payment amount for each person shall be computed individually for such months.

The eligibility of an individual or a couple for payment for a month will be based on the marital status as of the first day of the month; any subsequent change in marital status within a month will not affect eligibility for or the amount of payment for such month, §416.1001. Claimant and her husband were an eligible couple on September 1, 1974. They separated during September 1974. On October 1, 1974, they were separated. As of April 1, 1975, claimant and her husband will have been separated for a period of 6 months and, as of April 1, 1975, claimant will be eligible to receive benefits as an individual. These benefits will be in the amount of $146 per month.

Claimant submitted a copy of her Decree of Dissolution of Marriage, which states that the marriage will be dissolved effective May 7, 1975. As the date of dissolution would be after April 1, 1975, when the 6 months separation has ended, it will not affect this decision.

It is the decision of the Hearing Examiner that the status of claimant and her spouse as an eligible couple continues until they have been separated for a period of 6 months. The Supplemental Security Income benefits payable to claimant and her eligible spouse are to be divided equally until they have been separated for a period of 6 months and that the unearned income of claimant's spouse is considered income of claimant in computing the amount of Supplemental Security Income benefits.

Eligibility—Institutional Status

SECTION 1611(e)(1)(A) and (B) (42 U.S.C. 1382(e)(1)(A) and (B))—SUPPLEMENTAL SECURITY INCOME—ELIGIBILITY DUE TO INSTITUTIONAL STATUS

20 CFR 416.231 **SSR 76–7**

The claimant for Supplemental Security Income (SSI) was converted from the disability rolls of her local State welfare to the Federal rolls as of January 1974. Since that time, she has been a resident of a county owned and operated rest home, receives or has available treatment and/or services which are appropriate, and has not been absent from the home in any month for a period of more than 14 consecutive days. *Held*, since the claimant is in residential care rather than in a capacity requiring treatment normally furnished by a hospital, an extended care facility, a nursing home or an intermediate care facility; and the home is not receiving payments on her behalf under a plan approved under Title XIX of the Social Security Act as amended, the claimant is ineligible for her SSI benefits.

The general issue before the Hearing Examiner is whether the claimant is eligible to receive Supplemental Security Income benefits under Title XVI of the Social Security Act, as amended. The claimant was converted to the Supplemental Security Income rolls on January 1, 1974. She was notified by the Social Security Administration that because she resided in a public institution Supplemental Security Income checks could not be paid to her.

Applicable law in this case is section 1611(e)(1)(A) of the Act, which provides the following: "Except as provided in subparagraph (B), no person shall be an eligible individual . . . for purposes of this title with respect to any month if throughout such month he is an inmate of a public institution." Subparagraph (B) provides:

> (B) In any case where an eligible individual . . . is, throughout any month, in a hospital, extended care facility, nursing home, or intermediate care facility receiving payments (with respect to such individual or spouse) under a State plan approved under title XIX, the benefit under this title for such individual for such month shall be payable—
>
> (i) at a rate not in excess of $300 per year . . . in the case of an individual who does not have an eligible spouse;
>
> (ii) at a rate not in excess of the sum of the applicable rates specified in Subsection (b)(1) and the rate of $300 per year . . . in the case of an individual who has an eligible spouse, if only one of them is in such a hospital, home, or facility throughout such month; and
>
> (iii) at a rate not in excess of $600 per year . . . in the case of an individual who has an eligible spouse, if both of them are in such a hospital, home, or facility throughout such month . . .

The question to be resolved in this decision is whether the claimant is an inmate in a public institution. Section 416.231 of Regulations No. 16—which implements §1611(e)(1)(B) of the Social Security Act is applicable herein and provides in pertinent part:

> (a) *General*
>
> (1) Except as provided in subparagraph (2) of this paragraph, no person shall be an eligible individual or eligible spouse for purposes of title XVI of the Act with respect to any month and throughout such month person is an inmate of a public institution. . . .
>
> (2) . . . Where an eligible individual . . . is throughout any month in a hospital . . .

> skilled nursing facility . . . or intermediate care facility . . . receiving payments (with respect to such individual) . . . under title XIX . . . title XVI . . . shall be payable: a) at a rate of $300 per year. . . .
>
> (b) *Definitions.* For purposes of this part, the following definitions shall apply:
>
> (1) An 'institution' is an establishment which furnishes (in single or multiple facilities) food and shelter to four or more persons unrelated to the proprietor and, in addition, provides some treatment or services which meet some need beyond the basic provision of food and shelter.
>
> (2) A 'public institution' is an institution that is the responsibility of a governmental unit, or over which a governmental unit exercises administrative control.
>
> (3) An 'inmate of a public institution' is a person who is living in a public institution and receiving treatment and/or services which are appropriate to the person's requirements. A person is not considered an inmate when he is in a public educational or vocational training institution, for purposes of securing educational or vocational training.
>
> (4) Being in an institution 'throughout a month' means a continuous stay involving 24 hours of every day in a calendar month. Brief periods of absence . . . lasting not more than 14 consecutive days, would not interrupt a continuous stay in the institution.

The claimant's representative testified that the claimant resides at a health facility licensed by the State Board of Health and it is a residential and comprehensive health care facility. He also stated that the home is not a privately owned institution, it is supported through tax monies from the county taxpayers and is under the direct operation and supervision of the County Commissioners. He further testified that the home does not receive donations in the form of money from any private individual or sources.

The representative said that there are medical facilities at the home that provide 24-hour-a-day nursing services, that a physician is employed by the facility and the physician treats any and all residents there without regard to race, color, or creed or national origin as the need may arise. The facility also dispenses medication to the residents if ordered by the physician and they are taken out into the community for prescribed medical treatment if so prescribed by the doctor.

The representative also testified that although the claimant is residing in the facility, she is not an inmate of the facility as defined under section 1611(e)(1)(A) of the Act. He stated that "the people residing in the facility are . . . not committed by a court or any action of anyone for their living arrangments." The claimant, as well as other residents of the facility, were free to leave the home at any time, they could come and go as they wished, they were not restricted in any way regarding their freedom of egress and ingress at the facility.

The representative further stated that the facility is licensed to participate in title XIX under the Social Security Act, but the claimant is not involved in the benefits of that title in this instance because she is not receiving intermediate or skilled nursing care.

The Hearing Examiner in summarizing the facts set out:

(1) the claimant resides at the facility and also that the facility is an establishment which furnishes in multiple facilities, food and shelter to more than four persons who are unrelated to the proprietor. In addition, the facility provides treatment and services which are available to meet needs of the claimant that are beyond the basic provisions of food and shelter.

(2) the facility is a public institution under the Act in that it is an institution that is the responsibility of a governmental unit (the county) and that governmental unit exercises administrative control over the facility.

(3) the claimant is an inmate of a public institution and is living in the facility, a public institution (and receiving services there in which are appropriate to the claimant's requirements.) The claimant is not residing in a public educational or vocational training institution nor is the claimant residing in the facility for the purposes of securing educational or vocational training.

The claimant, because she is an inmate of a public institution under the Act, is precluded from eligibility for Supplemental Security Income benefits with respect to any complete month she resides at the home. Periods of absence not more than 14 consecutive days on the part of the claimant while continuing in the status of an inmate of the facility, do not interrupt a continuous stay in the facility in any one month.

The evidence fails to show that the claimant is or has throughout any month been in a hospital, extended care facility, nursing home or intermediate care facility receiving payments with respect to the claimant under a State plan approved under title XIX of the Social Security Act. Hence, the claimant is not eligible for partial payments under the Act for any complete month that the claimant resides at the home.

It is the decision of the Hearing Examiner that the claimant, is ineligible for Supplemental Security Income benefits under the provisions of title XVI of the Social Security Act as amended, and such ineligibility will continue until such time as the claimant ceases to be an inmate of a public institution under the Act.

Unearned Income

SECTIONS 1611(a)(1) and 1612(a) and (b) (42 U.S.C. 1382(a)(1), and 1382a(a) and (b))—SUPPLEMENTAL SECURITY INCOME—UNEARNED INCOME—SERVICE ALLOTMENTS

20 CFR 416.1102(a) SSR 76-18

The Supplemental Security Income (SSI) recipient began receiving an allotment from her daughter who was in the military service. The daughter claimed the entire allotment was not intended for the sole use of the claimant but rather to supplement her living expenses. The balance was to be deposited to a joint savings account. The claimant contended that only the amount she actually used for her support should count as her income in computing any SSI payment due her. *Held*, in accordance with sections 1612 (a) and (b) of the Social Security Act, the entire allotment is income attributed directly to the claimant and chargeable to her as "unearned income" as defined in those sections. Therefore her SSI payment must be adjusted accordingly.

It has been determined that the claimant meets all factors of eligibility for supplemental security income except with respect to the question of income. Accordingly, the issue before the Hearing Examiner is whether the claimant's income, other than income excluded pursuant to section 1612(b) of the Social Security Act, is at a rate of no more than $1,752 per calendar year as set forth in section 1611(a)(1)(A) of the Act.

At the hearing, the claimant readily testified that she had been receiving the sum of $180 monthly as an allotment from her daughter who entered the Army in June, 1974. These allotments were effective with the month of January, 1975, and the claimant testified that the allotment check was made to her solely. However, she testified that the intent of the allotment check was not for her sole use; rather, her daughter had instructed her to place the money in a joint savings account and the claimant was to use whatever was necessary to maintain a decent standard of living, particularly in the area of food acquisition. According to the claimant, when her daughter was discharged from the Army she planned to use the money left in the savings account for educational expenses. The claimant further testified that she never used all of the $180 monthly for her own expenses. In fact, she seldom used as much as one-half of the money sent for her own personal use. Claimant also testified that at the time that her daughter made the allotment payable to her, she was not receiving supplemental security income benefit checks but was subsequently restored to supplemental security income benefits.

The claimant did not present the savings account book which would have shown the deposits and withdrawals from the joint account which was maintained and supplemented with the allotment check.

A representative of the Social Security Office personally inspected the records of the Army Finance Center, Indianapolis, Indiana, to verify the allotment in question. He found that the allotment was in the amount of $180 monthly beginning January, 1975, through April, 1975, and $100 monthly beginning May, 1975. There was on record a request from the daughter that the allotment be terminated effective July, 1975.

Section 1611(a)(1)(A) of the Social Security Act provides, as pertinent herein, that a disabled individual who does not have an eligible spouse and whose income, other than income excluded pursuant to section 1612(b)(2) is at a rate of not more than $1,752 per calendar year shall be an eligible individual for purposes of the Act.

Section 1612(a) of the Social Security Act states that "income" means both earned and unearned income. "Earned income" means only wages and net earnings from self-employment as defined in sections 203 and 211 of the Act, respectively, (with exceptions as provided in section 1612(a)). "Unearned income" means all other income.

Section 1612(b) sets forth the types of income which may be excluded in determining an individual's income for the purpose of title XVI of the Social Security Act.

Section 1612(b)(2) of the Social Security Act provides, as pertinent herein, that in determining the income of an individual there shall be excluded the first $240 per year (or proportionately smaller amounts for shorter periods) of income (whether earned or unearned) other than income which is paid on the basis of the need of the eligible individual.

Section 416.1102(a) of Regulations No. 16 defines income. The term "income" for purposes of title XVI of the Social Security Act (the Supplemental Security Income Law) means the receipt by an individual of any property or service which he can apply, either directly or by sale or conversion, to meeting his basic needs for food, clothing, and shelter.

The law and regulations cited above provide that a disabled individual is entitled to supplemental security income benefits only if her income, after excludable deductions, does not exceed the sum of $1,752 yearly, or $438 quarterly (or $146 monthly if the claimant is potentially entitled to one or more payments during a calendar quarter). Regulations No. 16, section 416.1102(a) defines income for purposes of title XVI as the receipt by an individual of any property or service which he *can apply* (emphasis supplied), either directly or by sale or conversion, to meeting his basic needs for food, clothing, and shelter. In view of this regulation, it becomes clear that the allotment to the claimant by her daughter could have been wholly applied by the claimant toward meeting her basic needs for food, clothing, and shelter. It does not matter that the proceeds of the allotment were not, in fact, so applied by the claimant so long as she could have applied the proceeds in the manner mentioned by the regulations. Certainly, this might seem inequitable if the claimant applied only a portion of the allotment toward her living expenses, as she testified. However, the regulations are clear that the entire amount of the allotment must be charged as income to the claimant.

The only exclusion that can be applied toward the allotment proceeds received by the claimant is the exclusion outlined in section 1612(b)(2) of the law which provides for an exclusion of $240 yearly or $60 quarterly or $20 monthly. In this case, section 1611(c) (1) of the law provides for quarterly computation of countable income.

In accordance with the above, it is concluded and found by the Hearing Examiner that the claimant is not entitled to supplemental security income benefits for the quarter ending in March, 1975, by reason of the fact that she was receiving income in excess of the amount allowed by law.

For the three months ending in June, 1975, it is found that the claimant received the sum of $380 as proceeds of the allotment. Deducting the sum of $60 in accordance with law, the countable income of the claimant for that quarter was $320. Deducing $320 from potential payments of $438 ($146 for three months) results in the amount of $118 in benefits owing to the claimant for the quarter ending June 30, 1975.

Nonexcludable Resources

SECTIONS 1602, 1611(a)(1)(B), and 1613(a) (42 U.S.C. 1381a, 1382(a)(1)(B) and 1382b(a))—SUPPLEMENTAL SECURITY INCOME—NONEXCLUDABLE RESOURCES

20 CFR 416.1201, 416.1205(a), 416.1210, 416.1218,
416.1224, and 416.1240 SSR 76-8

> **The Social Security Administration disallowed the claimant's application for supplemental security income because of excess resources. Under pertinent regulatory criteria, a resource is defined to include real or personal property which may be converted to cash and used for support and maintenance. Thus, the property is considered a resource if the claimant had the right to convert it to cash to be used for his support and maintenance. The claimant is allowed to exclude from his countable resources the value of one vehicle (provided the value does not exceed prescribed amounts). In addition to cash, the claimant owned several vehicles, and held a note and Deed of Trust, and a contract of sale for balances owed him for the sale of several pieces of property. *Held,* the excess vehicles, the note and Deed of Trust, and the contract of sale could be converted to cash and used for the claimant's support and maintenance, and thus, after considering their approximate market value, the claimant's non-excludable resources exceed the amount permitted under title XVI of the Social Security Act and he is therefore ineligible for supplemental security income benefits.**

Section 1602 of the Social Security Act provides, in part, for the payment of benefits by the Secretary of Health, Education, and Welfare, to every aged individual who is determined to be eligible on the basis of his income and resources.

Section 1611(a)(1)(B) indicates that each aged individual who does not have an eligible spouse and—

> whose resources, other than resources excluded pursuant to section 1613(a), are not more than (i) *** (ii) in case such individual has no spouse with whom he is living, $1,500, shall be an eligible individual for purposes of this title.

Section 416.1205 of Regulations No. 16 states in pertinent part, as follows:

> An aged, *** individual without an eligible spouse may have nonexcludable resources not in excess of $1,500, and not be ineligible for benefits under title XVI of the Act.

The evidence indicates the claimant purchased a 1961 pick-up truck around 2 years ago for about $350. It is presently operable, but is not driven because it is not licensed by the State in which he lives due to a dispute pending over a prior licensing debt of $27.

He also owns a 1958 automobile, which is inoperable and which was purchased for an agreed sum of $100, upon which a balance of $49 is presently due. The claimant continues to own a 2-ton truck, which he purchased around 1971,which is also operable. However, this vehicle is also unlicensed because of a dispute over the need for a smog device. Finally, he owns a 1974 motorcycle, which he purchased in October of that year for about $542.

The approximate market value of the above-said vehicles is reflected as follows:

1964 Ford truck	$100
1958 Simca station wagon	$100
1966 2-ton Chevrolet truck	$400
	$600

The claimant's 1974 motorcycle was excluded as a resource pursuant to §416.1218 of Regulations No. 16.

The claimant sold 22 acres of unimproved land on January 17, 1969, for $1,800. Said sale was secured by note and Deed of Trust bearing interest at the rate of 7½ percent per annum. He indicated the present balance thereof was $1,439.

It was also indicated by the claimant, that he owned 3 lots and sold same, pursuant to a contract of sale around February 1973 for $2,000. The purchase price was payable at the rate of $25 per month. At the time of the hearing, the claimant stated that the purchaser was in default and the balance due upon the above-said contract of sale was $1,665. If the sale were not to be completed, the claimant assessed the market value of this property at approximately $4,600.

"Liquid resources" at the time of the hearing approximated $95.

Section 416.1210 indicates which resources shall be excludable with the following language:

> In determining the resources of an individual, the following items shall be excluded:
>
> (a) The home 'including the land appertaining thereto' to the extent its value does not exceed the amounts set forth in §416.1212;
>
> (b) Household goods and personal effects to the extent that their total value does not exceed the amount provided in §416.1216;
>
> (c) An automobile to the extent that its value does not exceed the value provided in §416.1218;
>
> (d) Property of a trade or business which is essential to the means of self-support as provided in §416.1222;
>
> (e) Nonbusiness property which is essential to the means of self-support as provided in §416.1224***

Section 416.1201 of Regulations No. 16 generally defines resources as follows:

> For purposes of this Subpart L, resources mean cash or other liquid assets or any real or personal property that an individual (***) owns and could convert to cash to be used for his support and maintenance. If the individual has the right, authority, or power to liquidate the property, or his share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual.

In view of the foregoing, it appears the total countable resources the claimant are as follows:

3 vehicles	$ 600
balance of note and Deed of Trust (sale January 1969)	$1439
balance contract of sale (sale February 1973)	$1665
cash	$ 95
	$3799

It is the decision of the Administrative Law Judge that the claimant's resources, after exclusions, exceed the maximum amount permitted under the law and, therefore, he is not eligible for Supplemental Security Income benefits under the Social Security Act.

Resources—Prepaid Burial Contracts

SECTIONS 1613(a) (42 U.S.C. 1382b(a))—SUPPLEMENTAL SECURITY INCOME—RESOURCES—PREPAID BURIAL CONTRACTS—MINNESOTA

20 CFR 416.1201(a) **SSR 76-9**

Held, prepaid burial contracts are revocable in accordance with Minnesota State laws and must be treated as a countable resource in establishing eligibility to Supplemental Security Income.

The standard "Agreement for Pre-Paid Funeral used in Minnesota contains the following language:

> "Pursuant to the laws of Minnesota, 1953, Chapter 481, the payments made under this contract shall remain intact as a trust fund until the obligation of this contract is fulfilled according to its terms, or until refunded to the person who made the payments (or payment) upon his demand."

Funds used to make payments for a burial trust containing the above language should be treated as resources of the depositor of the funds for the purpose of determining eligibility for SSI in Minnesota. This is because the agreement and the cited Statute, also contained at Minnesota Statutes Annotated §§149.11–149.14, allow a refund to be made to the person who made the payment or payments upon his demand, and are therefore revocable by the depositor of the funds.

Also for consideration were two agreements that were submitted on standard forms, however, these forms were modified in that they refer to the Funeral Director and purchaser rather than to the Trustee and Beneficiary. Moreover, the words "held in trust" have been inserted throughout one of the agreements and in the other agreement, reference is made to a Certificate of Deposit.

Although an evaluation of the two modified agreements would be less clear-cut than an evaluation of the standard agreement, the funds used to make payments under the modified agreements should also be treated as resources of the depositor of the funds for the purpose of determining eligibility for SSI benefits in Minnesota.

Generally, we look to State law to determine whether a particular arrangement is revocable or irrevocable, however, such laws are not dispositive of issues involving whether a person's property interest in a pre-paid funeral arrangment is or is not an includable resource for purposes of determining eligibility for SSI benefits.

Notwithstanding the fact that the modified agreements made no reference to the laws of Minnesota, 1953, Chapter 481, also contained at Minnesota Statutes Annotated §§149.11–149.14, they are subject to the requirements of that law. Minnesota Statutes Annotated §149.11 reads as follows:

> When prior to the death of any person, he or someone in his behalf, enters into any transaction, makes a contract, or any series or combination of transactions or contracts with another person, partnership, association or corporation, other than an insurance company licensed to do business in the State of Minnesota, for or related to the disposition of his body, by the terms of which, certain personal property will be delivered upon his death, or the professional services of a funeral director or embalmer will then be furnished, or both, then the total of all money so

> paid by the terms of such transaction, contract or series or combination of transactions or contracts shall be held in trust for the purpose for which it has been paid until the obligation of transactions or contracts is fulfilled according to its terms, or refunded to the person who made the payment or payments, upon his demand. Accruals of interest or dividends declared upon the sum of money so held in trust are subject to the same trust.

The above Statute clearly covers all prearranged funeral plans, whether they be styled as trust agreements, contracts, or other modes of transaction. The substance of the arrangements cause the requirements of the Statute to apply, rather than the form by which such arrangements are made. Whenever the substance of a contract is a funeral plan, the Statute directs that the funds paid are to be held in trust until the contract has been fulfilled or the money is refunded to the depositor of the funds upon his demand. We therefore conclude that the funeral plans created under the modified agreement forms are subject to the requirements of Minnesota Statutes Annotated §149.11, and that revocable trusts are created thereunder.

Hearings and Appeals

SECTIONS 1631(c) (42 U.S.C. 1383(c))—SUPPLEMENTAL SECURITY INCOME—HEARINGS AND APPEALS—EFFECT OF ABANDONMENT

20 CFR 416.1423, 416.1450, and 416.1453 SSR 76-43

The claimant filed his application with the State after June 1973 for Aid to the Disabled and was converted to the Federal program in January 1974. Subsequently he was notified he did not meet Federal standards to receive SSI payments based on disability. He requested a reconsideration of the determination; such reconsideration upheld the initial determination. The claimant then requested a hearing and his benefits were continued pending a decision on his claim. He failed to acknowledge receipt of Notice of hearing and did not respond to other attempts to contact him. *Held*, the claimant's request for hearing is dismissed as abandoned in accordance with Regulations No. 16, section 416.1450. *Further held*, the reconsideration determination is binding and becomes the final decision of the Secretary of Health, Education and Welfare.

The claimant filed his application for Aid to the Disabled with the State after June of 1973. He was determined to be disabled and entitled to disability benefits from the State in October of 1973. On January 1, 1974, claimant was converted from the State to the Federal disability program. On September 1, 1974, the claimant was notified that since he had not received any disability check from the State for any month prior to July 1973 and since it had been determined that he did not meet the Federal standard of disability, then he was not entitled to receive any supplemental security income benefits. He requested a reconsideration of that determination on October 7, 1974. Claimant was advised on or about November 14, 1974, that his original denial had been affirmed and the Social Security Administration terminated his benefits at that time.

On May 29, 1975, the claimant was notified that he had been receiving supplemental security income benefits for the months of December 1974 through the date of the notification because the Federal court in the case of *Buckles* v. *Weinberger*, 398 F. Supp. 931 (1975), held that the Social Security Administration had used improper procedures to terminate his benefits. Claimant was further instructed that if he still disagreed with the initial and reconsidered determinations, he could request a hearing and his benefits would be continued through the rendering of a decision on his claim. The claimant filed a timely request for a hearing on June 27, 1975. A notice of hearing was mailed on November 7, 1975, to the same address that the claimant listed in his request for hearing dated June 27, 1975. Prior to the hearing, a subsequent letter was mailed to the claimant on November 28, 1975. This letter was mailed to the claimant because he had not returned a card indicating whether he would appear at the hearing nor had he contacted the Hearing Examiner as to his intentions. The claimant did not appear at the hearing nor did he respond to the letter dated November 28, 1975.

On December 19, 1975, a notice to show cause for failure to appear was mailed to the claimant by certified mail, return receipt requested. The certified letter was returned with the notation "refused" stamped on it. The certified letter had been mailed to the address listed by the claimant on his request for hearing.

The appropriate sections of Regulations No. 16 as apply here are as follows:

§ 416.1423 Effect of a reconsidered determination. The reconsidered determination shall be final and binding upon all parties to the reconsideration unless a hearing is requested and a decision rendered or unless such determination is reopened and revised, pursuant to § 416.1475 and § 416.1477, or unless the expedited appeals process is used, in accordance with § 416.1424 *et. seq.*

§ 416.1450 Dismissal by abandonment of party. With the approval of the presiding officer, a request for hearing may also be dismissed upon its abandonment by the party or parties who filed it. A party shall be deemed to have abandoned a request for hearing if neither the party nor his representative appears at the time and place fixed for the hearing and either: (a) prior to the time for hearing such party does not show good cause as to why neither he nor his representative can appear; or, (b) within a reasonable period after furnishing of notice to him by the presiding officer to show cause, such party does not show good cause for such failure to appear and failure to notify the presiding officer prior to the time fixed for hearing that he cannot appear.

§ 416.1453 Effect of dismissal. The dismissal of a request for hearing shall be final and binding unless vacated in accordance with § 416.1454.

Pursuant to the above cited sections of the regulations, the Hearing Examiner concludes that the claimant's request for hearing should be dismissed as the claimant has abandoned his request for a hearing.

The dismissal means that the findings in the reconsideration determination are binding on the claimant since no further decision was rendered (Regulations No. 16, section 416.1423). The reconsideration determination affirmed the initial determination which held that the claimant was not disabled.

Since the claimant is in pay status because of the Federal court decision this dismissal means that his benefits should be ceased immediately and it also means that the claimant is considered not to have been disabled for any month after December 1973.

Disposition of Underpayment

SECTION 1631(b) (42 U.S.C. 1383(b))—SUPPLEMENTAL SECURITY INCOME—DISPOSITION OF UNDERPAYMENT

20 CFR 416.542(b) **SSR 76-10**

> The supplemental security income recipient lived in a nursing home more than three years prior to her death. Her husband filed as her representative payee and also received a supplemental security income payment as an eligible individual. The claimant died before receiving any payments. Her husband claimed that all due monies should be paid to him. *Held*, the law is quite definite in listing when and to whom an underpayment may be made. Although the husband is an eligible individual, he was not living with the claimant at the time of her death and does not meet the requirements of Regulations No. 16, §416.542(b).

The general issue to be determined is whether the husband is an eligible recipient of supplemental security income underpayments due his deceased wife.

The specific issue on which findings will be made and conclusions will be reached, is whether the surviving husband is an eligible member of a couple to receive the benefits due his deceased wife who, at the time of her death, was a resident of a nursing home in which he did not reside.

On November 26, 1974, the husband filed an application for himself and as a representative for his aged and disabled wife. She had been confined to a nursing home since June 2, 1971. According to the husband's testimony, his and his wife's savings were used to maintain her in the nursing home, and there was no assistance from Federal or State funds. He and his wife, prior to her need for care in the nursing home, had maintained a home together since their marriage on December 18, 1910.

His claim for benefits was processed expeditiously, and he commenced receiving payments with a monthly check about January 1, 1975, and a retroactive benefit check thereafter on January 6, 1975. On January 7, 1975, he inquired regarding his wife's supplemental security benefits which had not yet been received. On January 19, 1975, she passed away. On January 21, 1975, the surviving spouse filed a claim for the amounts due in the case of his deceased wife.

On January 22, 1975, he was advised by letter from the Social Security Administration that:

> Section 1631(b) of the Social Security Act provides that money due a supplemental security income recipient who dies may be paid only to the deceased individual's surviving husband or wife who was also a supplemental security income recipient in the month the deceased individual died and was receiving benefits as a spouse. If there is no such surviving husband or wife, the payments due the deceased recipient

> cannot be made to anyone.

On January 28, 1975, he was sent a further letter from the Social Security Office, stating that his wife was eligible to receive the supplemental security income payment.

On his request for reconsideration, the reason for reconsideration was:

> "According to your notice of January 22, 1975, this indicates I'm to receive my wife's "SSI checks for November '74 through January '75. Yet when I went to Soc. Sec. office they told me I couldn't get her back pay."

A Notice of Decision letter was sent advising him that:

> "As you requested, your claim for the supplemental security income underpayment has been thoroughly examined.
>
> A supplemental security income underpayment due on behalf of a deceased individual by law is generally payable only to the surviving eligible spouse. To receive a supplemental security income payment due a deceased member of a couple, the surviving member must meet requirements for eligibility as a member of a couple for the month of death.
>
> For the month of death, you met requirements for eligibility as an individual but did not meet the requirements for eligibility as a member of a couple. Therefore, the payment due your wife cannot be made to anyone."

The first letter to the husband, dated January 22, 1975, was incomplete in that it did not specify that the surviving spouse had to be living in the same household with the deceased spouse at the time of death in order to qualify for the unpaid benefits. This omission was covered in the Notice of Decision letter of February 24, 1975.

On February 25, 1975, the spouse signed a request for hearing which stated:

> I don't feel that this is an underpayment, I feel it was a back payment. Her application and my application were filed on the same day in 11/74. I rec'd my initial payment 1/1/75 and on 1/6/75, I received my back payment for 11/74 and 12/74.

The deceased wife was not receiving Title XIX Medicaid and was not in a public institution. She was entitled to supplemental security income benefits to supplement her Title II social security payments.

After careful consideration of the evidence in this case, it is clear that because of the care she required, the deceased wife was in a private nursing home from June 2, 1971, until the date of her death on January 19, 1975. Although their separation was not due to marital difficulties, they were, in fact, living in separate households from each other at the time of her death. The social security office correctly took two applications from the husband when he filed applications on November 26, 1974. The benefits payable to each eligible individual living in a separate household is greater than the benefits paid to the two as a couple. Had the wife lived, she and her husband would have received more benefits over a period of time as eligible individuals than they would have as an eligible couple. This may well be the legislative reason that the surviving spouse of an eligible couple is entitled to receive the unpaid benefits of his deceased spouse.

The supplemental security income program is a creature of statute, and the administrative law judge must be guided by the legislation and regulations pertaining to the creation of the program. As inequitable or unfair as it may appear to the surviving spouse that his wife's application was not as promptly processed and paid as his, nonetheless, delay did occur, and because they were living separately when she died on January 19, 1975, he is not eligible to receive her unpaid benefits.

It is the decision of the administrative law judge that the underpayment due the deceased individual cannot be legally paid to her surviving spouse because they were living in separate accommodations at the time of her death, and he does not meet the requirements of Section 416.542(b) of Regulations No. 16.

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*During 1975, the Social Security Administration conducted a study to update the rulings. All the rulings published from 1960 - 1974 were reviewed to determine which were still applicable. As a result, numerous rulings were found to be either obsolete or outdated due to changes in the law, or regulations since the original publication of the ruling. These are rescinded without replacement rulings at this time.

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